Unpublished Cases

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United States District Court,
M.D. Pennsylvania.

BILL GOODWIN CONSTRUCTION, LLC, Plaintiff
v.
WONDRA CONSTRUCTION, INC.; Renewable Energy Systems Americas, Inc.; Renewable Construction; Res American Construction Company, Inc.; Mehoopany Wind Energy, LLC; BP Wind Energy North America, Inc.; Sempra U.S. Gas & Power; Zurich American Insurance Company and Fidelity & Deposit Company of Maryland, Defendants.

No. 3:13cv157.
|
Signed April 10, 2014.

Attorneys and Law Firms

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MEMORANDUM

JAMES M. MUNLEY, District Judge.

***1** Before the court are defendants' motions to dismiss (Docs. 56, 58 & 62) and strike (Docs.54, 59) pursuant to Federal Rules of Civil Procedure 12.[1] The motions are fully briefed and ripe for disposition.

1 The court denied Zurich and Fidelity's motion to dismiss plaintiff's complaint in a previous memorandum and order. (*See* Doc. 36, Mem. & Order dated Aug. 5, 2013). As such, any reference to "defendants" within this memorandum shall exclude Zurich and Fidelity.

Background

This case arises from a dispute over oral construction contracts pertaining to the construction of a wind farm (hereinafter the "Mehoopany Windmill Project" or "project") in Wyoming County, Pennsylvania. Defendants BP Wind Energy North America, Inc. (hereinafter "BP"), Mehoopany Wind Energy, LLC (hereinafter "Mehoopany Wind Energy") and Sempra U.S. Gas & Power (hereinafter "Sempra") were partners in a joint venture to construct the Mehoopany Windmill Project. (Doc. 48, Am. Compl. (hereinafter "Am. Compl.") ¶¶ 3, 5, 11). These partners hired Defendants Renewable Energy Systems Americas Inc. and RES America Construction Inc. (collectively "RES") to act as the general contractor. (*Id* . ¶ 12). RES, in turn, hired Defendant Wondra Construction, Inc. (hereinafter "Wondra") as a subcontractor. (*Id.* ¶ 13). Finally, Wondra hired Plaintiff Bill Goodwin Construction, LLC (hereinafter "plaintiff") as its subcontractor. (*Id.* ¶ 14).

Oral agreement between plaintiff and Wondra

In November 2011, Wondra entered into an oral agreement with plaintiff, which required plaintiff to deliver stone and other material in addition to providing equipment and services for the construction of roadways for the project. (*Id.* ¶¶ 14–15). Subsequent to this agreement, plaintiff hired its own subcontractors to assist in the delivery of stone and other material. (*Id.* ¶ 15).

Under the terms of this oral agreement, Wondra agreed to pay plaintiff ten dollars and fifty cents ($10.50) for each ton of material delivered. (*Id.* ¶ 16). Plaintiff avers that this tonnage price covered the actual cost of material, valued at five dollars and fifty cents ($5.50) a ton, and the hauling/delivery costs of five dollars ($5.00) per ton. (*Id.* ¶ 17). This oral agreement **did not** include the hourly truck time for use of plaintiff's trucks.

Safety meeting

During the first month of the oral agreement, plaintiff met with representatives of BP, Mehoopany Wind Energy and Wondra. (*Id.* ¶ 18). At this meeting, Michael Kelly, BP Safety Engineer, discovered that Wondra was only paying plaintiff by the ton. (*Id.*) Plaintiff claims that Kelly, on behalf of BP, demanded that plaintiff and all other delivery trucks be **paid by the hour** in addition to material by the ton. (*Id.* ¶¶ 19, 21) (emphasis added). Specifically, Kelly stated that "if this condition was not met, plaintiff and the other delivery trucks would not be able to haul on the job." (*Id.* ¶ 20). Evidently, Kelly was concerned that if the haulers were only paid by the ton, they would have an incentive to travel as quickly as possible between hauls, which could create safety hazards. (*Id.* ¶ 22). Additionally, Kelly demanded this change to comply with BP and Mehoopany Wind Energy's internal procedures. (*Id.* ¶ 23).

Oral modification of plaintiff's oral agreement with Wondra

***2** Subsequent to this meeting, plaintiff and Wondra agreed to modify their initial oral agreement. (*Id.* ¶ 24). Wondra agreed to pay plaintiff by the ton **as well as by the hour** so as to ensure the continued safety of all parties involved in the project. (*Id.* ¶ 25) (emphasis added). In exchange for slower and safer hauling, Wondra agreed and promised that it would pay plaintiff five dollars ($5.00) to seven dollars ($7.00) per ton and seventy-five dollars ($75.00) to ninety dollars ($90.00) an hour for truck time. (*Id.* ¶¶ 25–26).

Plaintiff, in turn, modified the payment arrangements with its subcontractors. Specifically, plaintiff made arrangements to pay its subcontractors an hourly rate between seventy-five dollars ($75.00) and ninety dollars ($90.00). (*Id.* ¶ 28). Plaintiff's subcontractors, however, would no longer receive a tonnage rate in addition to truck time. (*Id.*)

Plaintiff performed its duties pursuant to the oral agreement and oral modification and submitted invoices to Wondra in June and July 2012. (*Id.* ¶¶ 30–31). Plaintiff alleges Wondra failed to remit full and complete payment even though RES and/or BP, Mehoopany Wind Energy and Sempra paid Wondra. (*Id.* ¶¶ 34, 36). Plaintiff claims the unpaid invoices amount to $1,911,382.91. (*Id.* ¶ 35).

Oral agreement between plaintiff and RES

Plaintiff also claims that it entered into a separate and distinct oral agreement with RES in June 2012. (*Id.* ¶ 37). Specifically, RES agreed and promised to pay plaintiff to provide both the necessary stone material and deliver this material for the completion of the roadways within the project. (*Id.* ¶¶ 37–38). This stone material was in addition to and separate from the work and materials plaintiff was to provide pursuant to plaintiff's oral agreement and oral modification with Wondra. (*Id* . ¶ 40).

RES agreed to pay plaintiff ten dollars and fifty cents ($10.50) for each ton of stone material delivered and plaintiff's drivers eighty dollars ($80.00) an hour for any downtime experienced while on the project site. (*Id.* ¶ 37). Plaintiff provided $115,705.63 in materials and services for the project at the direction and request of RES. (*Id.* ¶ 41). RES accepted plaintiff's materials and services. (*Id.* ¶ 42). BP, Mehoopany Wind Energy and Sempra have paid RES for work related to the project. (*Id.* ¶ 46). RES, however, has refused to pay plaintiff. (*Id.* ¶¶ 43–44).

Procedural history

Based upon these facts, plaintiff filed an eight-count complaint asserting several causes of action. On August 5, 2013, the court allowed only plaintiff's breach of contract claim to proceed against Defendants Zurich and Fidelity. (Doc. 36, Mem. & Order dated Aug. 5, 2013). The court dismissed all remaining counts and allowed plaintiff to file an amended complaint. (*Id.*)

After two (2) court approved 30–day extensions, plaintiff filed a timely amended complaint on October 11, 2013. Plaintiff's amended complaint asserts the following causes of action: Count One, breach of contract against Wondra; Count Two breach of contract against RES; Count Three, promissory estoppel against Wondra; Count Four, promissory estoppel against RES; Count Five, promissory estoppel against BP and Mehoopany Wind Energy; Count Six, tortious interference with contractual relations against BP and Mehoopany Wind Energy; Count Seven, agency relationship against BP, Mehoopany Wind Energy, Sempra, RES and Wondra; Count Eight, unjust enrichment against BP, Mehoopany Wind Energy, Sempra, RES and Wondra; Count Nine, Pennsylvania's Contractor and Subcontractor Payment Act claim against Wondra; Count Ten, Pennsylvania's Contractor and Subcontractor Payment Act claim against RES; and Count Eleven, breach of contract against Zurich and Fidelity.

***3** The defendants now move to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docs. 56, 58 & 62). Additionally, BP, Mehoopany Wind Energy and Sempra move to strike Count Six, tortious interference with a contract and Count Seven, agency relationship from plaintiff's amended complaint. (Doc. 54). RES also moves to strike Count Seven from plaintiff's amended complaint. (Doc. 59). The parties then briefed the issues bringing the case to its present posture.

Jurisdiction

The court has jurisdiction pursuant to the diversity statute, 28 U.S.C. § 1332.[2] Because complete diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000, the court has jurisdiction over this case. *See* 28 U.S.C. § 1332 ("district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States[.]"); 28 U.S.C. § 1441 (A defendant can generally remove a state court civil action to federal court if the federal court would have had original jurisdiction to address the matter pursuant to the diversity jurisdiction statute). As a federal court sitting in diversity, the substantive law of Pennsylvania shall apply to the instant case. *Chamberlain v. Giampapa,* 210 F.3d 154, 158 (3d Cir.2000) (citing *Erie R.R. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

2 Plaintiff Bill Goodwin Construction, LLC is incorporated under the laws of the Commonwealth of Pennsylvania with its principal place of business in Pennsylvania. (Doc. 48, Am.Compl.¶ 1). Defendant Wondra is incorporated under the laws of the State of Wisconsin with its principal place of business in Wisconsin. (*Id.* ¶ 2, 619 A.2d 347). Defendant RES is incorporated under the laws of the State of Delaware with its principal place of business in Colorado. (*Id.* ¶ 4, 619 A.2d 347). Defendant Mehoopany Wind Energy, LLC is a limited liability company organized and existing under the laws of Delaware, with two members: Defendants BP and Sempra U.S. Gas & Power. (Doc. 1, Notice of Removal ¶ 19). Defendant BP is incorporated under the laws of the State of Delaware with its principal place of business in Texas. (Am.Compl.¶ 3). Defendant Sempra U.S. Gas & Power ("Sempra") is a limited liability company organized and existing under the laws of Delaware, with one member: Sempra Global. (Doc. 1, Notice of Removal ¶¶ 19, 21). Sempra Global is incorporated under the laws of the State of Delaware with its principal place of business in California. (*Id.*) Defendant Zurich American Insurance Company ("Zurich") is incorporated under the laws of the State of New York with its principal place of business in Illinois. (*Id.* ¶ 22, 619 A.2d 347). Defendant Fidelity & Deposit Company of Maryland ("Fidelity") is incorporated under the laws of the State of Maryland with its principal place of business in Illinois. (*Id.* ¶ 23, 619 A.2d 347).

Standard of Review

Defendants filed their motions to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The court tests the sufficiency of the complaint's allegations when considering a Rule 12(b)(6) motion. All well-pleaded allegations of the complaint must be viewed as true and in the light most favorable to the non-movant to determine whether, " 'under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.' " *Colburn v. Upper Darby Twp.,* 838 F.2d 663, 665–66 (3d Cir.1988) (quoting *Estate of Bailey by Oare v. Cnty. of York,* 768 F.2d 503, 506 (3d Cir.1985)). The plaintiff must describe " 'enough facts to raise a reasonable expectation that discovery will reveal evidence of ' [each] necessary element" of the claims alleged in the complaint. *Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 234 (3d Cir.2008) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Moreover, the plaintiff must allege facts that "justify moving the case beyond the pleadings to the next stage of litigation." *Id.* at 234–35. In evaluating the sufficiency of a complaint the court may also consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1384 n. 2 (3d Cir.1994) (citations omitted). The court does not have to accept legal conclusions or unwarranted factual inferences. *See Curay–Cramer v. Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 133 (3d Cir.2006) (citing *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir.1997)).

Discussion

***4** BP, Sempra, Mehoopany Wind Energy, Wondra and RES have filed three motions to dismiss plaintiff's amended complaint. (Docs. 56, 58 & 62). Collectively, they seek to dismiss all of plaintiff's claims.[3] Additionally, BP, Sempra, Mehoopany Wind Energy and RES have filed motions to strike plaintiff's claims for tortious interference with contract and agency relationship. (Docs.54, 59). Therefore, the court will first address the individual motions to dismiss, and if necessary, address the motions to strike.

3 Plaintiff asserts several claims against the following defendants: (1) BP, Sempra and Mehoopany Wind Energy are sued for promissory estoppel, tortious interference with a contract, agency relationship, and unjust enrichment; (2) Wondra is sued for breach of contract, promissory estoppel, Pennsylvania's Contractor and Subcontractor Payment Act, unjust enrichment and agency relationship; and (3) RES is sued for breach of contract, promissory estoppel, Pennsylvania's Contractor and Subcontractor Payment Act, unjust enrichment and agency relationship.

I. BP, Sempra and Mehoopany Wind motion to dismiss

Plaintiff's amended complaint asserts four claims against BP, Sempra and Mehoopany Wind Energy: (1) Promissory Estoppel; (2) Tortious Interference with a Contract; (3) Agency Relationship; and (4) Unjust Enrichment. BP, Sempra and Mehoopany Wind Energy challenge plaintiff's claims on two grounds. First, BP and Sempra argue that they are not co-owners of the project. Rather, BP and Sempra are members of Mehoopany Wind Energy-a limited liability company (hereinafter "LLC") and Mehoopany Wind Energy, LLC owns the project. Because Pennsylvania law states that members of an LLC cannot be sued on the basis of vicarious liability for the torts or contracts of an LLC, they are not liable. Second, these defendants contend that plaintiff's amended complaint fails to state claims upon which relief can be granted. The court addresses each issue in turn.

A. BP and Sempra motion to dismiss

BP and Sempra contend that they should be dismissed because they are **members** of Mehoopany Wind Energy and are not co-owners of the project. Plaintiff claims that BP and Sempra's arguments involve issues of fact related to complex and convoluted corporate structures, which are not appropriate for a motion to dismiss. After careful consideration, the court agrees with BP and Sempra.

Pennsylvania law states that members of an LLC cannot be sued on the basis of vicarious liability for the torts or contracts of the LLC. *See Freer v. Allied Servs.,* No. 3:11–CV–281, 2011 WL 5374445, at *3 (M.D.Pa. Nov.7, 2011) (citing 15 PA. CONS.STAT. ANN. § 8991(b)). In support of their contention that they are members of an LLC, BP and Sempra submit Pennsylvania approval permits, which illustrate that Mehoopany Wind Energy is the project owner.[4] (*See* Doc. 75, Ex. A, Pa. Unif. Constr. Code Approval dated Dec. 24, 2012; Doc. 75, Ex. B, Pa. Dep't of Transp. Permit dated Dec. 9, 2011; Doc. 75, Ex. C, Pa. Dep't of Envtl. Prot. Permit dated May 16, 2013). Moreover, BP and Sempra submit a document from the Federal Energy Regulator Commission, which confirms that BP and Sempra are owners of Mehoopany Wind Holdings, LLC—the single member of Mehoopany Wind Energy.[5] (Doc. 75, Ex. D, U.S. Fed. Energy Regulatory Comm'n Order dated Oct. 4, 2012 ¶¶ 1–5). Because Pennsylvania law precludes the imposition of individual liability upon members of an LLC, Mehoopany Wind Holdings, LLC cannot be liable, which in turn establishes that its parent companies, BP and Sempra, also cannot be liable. Accordingly, the court will grant BP and Sempra's motion to dismiss to the extent that BP and Sempra will be dismissed from this action.

4 The court takes judicial notice of these exhibits as matters of public record. *See Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1384 n. 2 (3d Cir.1994) (citations omitted) (stating that in evaluating the sufficiency of a complaint, the court may consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case.).

5 An illustration of the corporate structure is as follows:

B. Mehoopany Wind Energy motion to dismiss

***5** Having dismissed BP and Sempra, the court next addresses plaintiff's four claims against Mehoopany Wind Energy. These claims are: (1) Promissory Estoppel; (2) Tortious Interference with a Contract; (3) Agency Relationship; and (4) Unjust Enrichment. Mehoopany Wind Energy contends that plaintiff's claims fail to state a claim upon which relief can be granted. The court addresses these claims *in seriatim.*

1. Promissory estoppel

Plaintiff brings a promissory estoppel claim against Mehoopany Wind Energy. Under Pennsylvania law, promissory estoppel is defined as:

> [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice

can be avoided only by enforcement of the promise.

Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc., 535 Pa. 469, 636 A.2d 156, 160 (Pa.1994) (quoting RESTATEMENT (SECOND) CONTRACTS § 90(1)). Stated differently, plaintiff must establish that: 1) Mehoopany Wind Energy made a promise that it should have reasonably expected to induce action on the part of the plaintiff; 2) plaintiff actually took action in reliance on the promise; and 3) injustice can be avoided only by enforcing Mehoopany Wind Energy's promise. *Williams v. Standard Fire Ins. Co.,* 892 F.Supp.2d 608, 613 (citing *Crouse v. Cyclops Indus.,* 560 Pa. 394, 745 A.2d 606, 610 (Pa.2000)).

In the instant case, plaintiff avers that Michael Kelly, BP's Safety Engineer, promised plaintiff that it would be paid by the ton as well as by the hour for its work on the project. Pursuant to this promise, plaintiff modified the payment arrangements it had with its own subcontractors resulting in significant expense to the plaintiff. Mehoopany Wind Energy contends that plaintiff failed to allege a promise, which caused plaintiff to substantially change its position. After careful consideration, the court agrees with the plaintiff.

Plaintiff has adequately alleged a promise. Plaintiff avers that during November 2011, plaintiff met with representatives of BP and Wondra. (Am.Compl.¶ 18). At this meeting, Michael Kelly, BP's Safety Engineer, discovered that Wondra was only paying plaintiff by the ton. (*Id.*) Plaintiff claims that Kelly demanded plaintiff and all other delivery trucks be **paid by the hour** in addition to material by the ton. (*Id.* ¶¶ 19, 21) (emphasis added). Specifically, Kelly stated that "if this condition was not met, plaintiff and the other delivery trucks would not be able to haul on the job." (*Id.* ¶ 20, 745 A.2d 606). Evidently, Kelly was concerned that if the haulers were only paid by the ton the haulers would have an incentive to travel as quickly as possible between hauls, which could create safety hazards. (*Id.* ¶ 22, 745 A.2d 606). Viewing plaintiff's allegations as true, the court finds that plaintiff has properly pled a promise, which serves as the foundation for its promissory estoppel claim.

***6** Additionally, plaintiff relied on Kelly's promise to its detriment because plaintiff substantially changed its position regarding the payment terms with its own subcontractors. Specifically, plaintiff agreed to pay its own subcontractors by the hour in addition to material by the ton. (*Id.* ¶¶ 24–28). Plaintiff undertook this modification to its financial detriment because "it was more expensive for [p]laintiff to pay its sub-contractors at an hourly rate...." (*Id.* ¶ 29, 745 A.2d 606). As such, plaintiff has alleged sufficient facts to establish a *prima facie* case of promissory estoppel against Mehoopany Wind Energy.

2. Tortious interference with a contract

Plaintiff next asserts a tortious interference with contractual relations claim against Mehoopany Wind Energy pursuant to section 766A of the Restatement (Second) of Torts.[6] Pennsylvania Courts, however, have not adopted this section and the Third Circuit Court of Appeals has put its validity into serious doubt. Specifically, the Third Circuit "has suggested—without deciding—that the Pennsylvania Supreme Court is unlikely to adopt section 766A." *KDH Elec. Sys., Inc. v. Curtis Tech. Ltd.,* 826 F.Supp.2d 782, 805 (E.D.Pa.2011) (citing *Windsor Sec., Inc. v. Hartford Life Ins. Co.,* 986 F.2d 655, 659–63 (3d Cir.1993). The Third Circuit Court of Appeals has reaffirmed this prediction in a subsequent case. *See Gemini Physical Therapy & Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.,* 40 F.3d 63, 66 (3d Cir.1994) (reasoning that causing the performance of a contract to be more costly for the plaintiff is "too speculative and subject to abuse to provide a meaningful basis for a cause of action.").

6 Section 766A states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.
>
> RESTATEMENT (SECOND) OF TORTS § 766A.

Because the Pennsylvania Supreme Court has not ruled to the contrary, the court will follow the Third Circuit Court of Appeals in finding that plaintiff has not stated a cognizable claim under Pennsylvania law against Mehoopany Wind Energy. Accordingly, Mehoopany Wind Energy's motion to dismiss plaintiff tortious interference with a contract claim will be granted.[7]

7 The court will dismiss this claim with prejudice as an amendment would be futile. *See Alston v. Parker,* 363 F.3d 229, 235 (3d Cir.2004) (holding that district courts must permit a curative amendment within a set period of time unless such an amendment would be inequitable or futile).

3. Agency relationship

Mehoopany Wind Energy moves to dismiss plaintiff's "agency relationship" claim because it is not a recognized cause of action under Pennsylvania law. Rather, an agency relationship can only be used to attribute liability under separate, recognized causes of action. Plaintiff argues that agency relationship is a viable cause of action under Pennsylvania law.

Specifically, plaintiff claims that a court within the Middle District of Pennsylvania has recognized a claim for agency. *See Doe v. Ensey,* 220 F.R.D. 422 (M.D.Pa.2004). We disagree with plaintiff's interpretation of *Doe.* In *Doe,* Judge John E. Jones addressed a motion to compel discovery and merely recited the counts alleged in plaintiff's complaint in the procedural history section. *Id.* at 423–24. Judge Jones never acknowledged that this cause of action could form the basis for liability. *Id.* at 424–25. Indeed, our research has failed to discover any case, which supports plaintiff's proposition that Pennsylvania recognizes a claim for agency relationship. As a result, Mehoopany Wind Energy's motion to dismiss plaintiff's agency relationship claim will be granted. [8]

8 The court will dismiss this claim with prejudice as an amendment would be futile. *See Alston,* 363 F.3d at 235 (holding that district courts must permit a curative amendment within a set period of time unless such an amendment would be inequitable or futile).

4. Unjust enrichment

***7** Finally, Mehoopany Wind Energy moves to dismiss plaintiff's unjust enrichment claim. Pennsylvania courts have held that "[u]njust enrichment is essentially an equitable doctrine." *Styer v. Hugo,* 422 Pa.Super. 262, 619 A.2d 347, 350 (Pa.Super.Ct.1993). A plaintiff alleging unjust enrichment must establish the following elements: "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) the defendant's acceptance and retention of the benefit 'under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.' " *Giordano v. Claudio,* 714 F.Supp.2d 508, 530 (E.D.Pa.2010) (quoting *Filippi v. City of Erie,* 968 A.2d 239, 242 (Pa.Commw.Ct.2009)). Under these circumstances, "the law implies a contract between the parties pursuant to which the plaintiff must be compensated for the benefits unjustly received by the defendant." *Styer,* 619 A.2d at 350. The existence of such a contract "requires that the defendant pay the plaintiff the value of the benefits conferred ...." *Id.*

Mehoopany Wind Energy argues that plaintiff failed to allege sufficient facts regarding how the retention of benefits related to the project would be inequitable or unjust. Plaintiff avers that the modification of its contract price to comport with Mehoopany Wind Energy's desire to improve safety on the job, in addition to providing materials and labor for the project's construction, demonstrate that it conferred a benefit upon Mehoopany Wind Energy, which would be inequitable or unjust absent compensation. The court agrees with the plaintiff.

Plaintiff has pled that, over the course of its work on the project, it performed services and received instruction from Mehoopany Wind Energy, RES and Wondra. (*See* Am. Compl. ¶¶ 48–61). Plaintiff pled that these services were accepted and benefitted Mehoopany Wind Energy, RES and Wondra. (*Id.* ¶¶ 123–25). Given these facts, the reasonable inference that defendants are liable to plaintiff under the equitable theory of unjust enrichment can be drawn; thus satisfying federal pleading standards. Ergo, the court will decline to dismiss plaintiff's unjust enrichment claim at such an early stage in the proceeding.

II. Wondra motion to dismiss

Wondra moves to dismiss plaintiff's amended complaint on the following five grounds. First, plaintiff's breach of contract claim should be dismissed because plaintiff has failed to plead the terms of the alleged oral agreement. Second, plaintiff has failed to sufficiently allege a promise, which requires dismissal of plaintiff's promissory estoppel claim. Third, plaintiff's "agency relationship" claims fails because Pennsylvania does not recognize agency relationship as a cause of action. Fourth, Pennsylvania law precludes plaintiff from pleading unjust enrichment as an alternative to plaintiff's breach of contract claim. Fifth, plaintiff's Contractor and Subcontractor Payment Act claim should be dismissed because plaintiff failed to allege the existence of an enforceable contract. The court will address Wondra's arguments *in seriatim.*

A. Breach of contract

***8** Wondra moves to dismiss plaintiff's breach of contract claim alleging plaintiff failed to plead the terms of the alleged oral agreement and oral modification with sufficient clarity. Additionally, Wondra argues that the oral modification lacked consideration. Plaintiff avers that it has properly pled a breach of contract claim for both the original oral agreement and oral modification. The court agrees with the plaintiff.

Under Pennsylvania law, parties asserting claims for breach of contract must allege the following three elements to adequately state a claim: "(1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages." *Alpart v. Gen. Land Partners, Inc.,* 574 F.Supp.2d 491, 502 (E.D.Pa.2008) (citing *CoreStates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1058 (Pa.Super.Ct.1999)); *see also Mavrinac v. Emergency Med. Ass'n of Pittsburgh,* No. 2:04–cv–1880, 2005 WL 2304995, at *8 (W.D.Pa. Sept.21, 2005) (noting that to plead a breach of contract, "a plaintiff must assert the existence of a valid and binding contract; that the plaintiff has complied with [the] contract by performing her own obligations under it; [that] all conditions precedent were fulfilled; [that] there was a breach of the contract; and [that] damages were incurred" (citing *Pierce v. Montgomery Cnty. Opportunity Bd., Inc.,* 884 F.Supp. 965, 970 (E.D.Pa.1995))). Although every term of a contract need not be stated in complete detail, every element must be specifically pleaded. *Cutillo,* 723 A.2d at 1058. Clarity in the pleadings is "particularly important where an oral contract is alleged." *Pa. Supply, Inc. v. Am. Ash Recycling Corp.,* 895 A.2d 595, 600 (Pa.Super.Ct.2006) (citations omitted).

In the instant case, plaintiff and Wondra entered into and oral agreement in November 2011. (Am.Compl.¶ 14). This oral agreement required plaintiff to deliver stone and other material in addition to providing equipment and services for the construction of roadways for the project. (*Id.* ¶¶ 14–15). Subsequent to this agreement, plaintiff hired its own subcontractors to assist in the delivery of stone and other material. (*Id.* ¶ 15).

Under the terms of this oral agreement, Wondra agreed to pay plaintiff ten dollars and fifty cents ($10.50) for each ton of material delivered. (*Id.* ¶ 16). Plaintiff avers that this tonnage price covered the actual cost of material, valued at five dollars and fifty cents ($5.50) a ton, and the hauling/delivery costs of five dollars ($5.00) per ton. (*Id.* ¶ 17). This oral agreement **did not** include the hourly truck time for the use of plaintiff's trucks.

During the first month of the oral agreement, plaintiff met with representatives of BP, Mehoopany Wind Energy and Wondra. (*Id.* ¶ 18). At this meeting, Michael Kelly, BP Safety Engineer, discovered that Wondra was only paying plaintiff by the ton. (*Id.*) Plaintiff claims that Kelly, on behalf of BP, demanded that plaintiff and all other delivery trucks be **paid by the hour** in addition to material by the ton. (*Id.* ¶¶ 19, 21) (emphasis added). Specifically, Kelly stated that "if this condition was not met, plaintiff and the other delivery trucks would not be able to haul on the job." (*Id.* ¶ 20). Evidently, Kelly was concerned that the haulers would have an incentive to travel as quickly as possible between hauls, which could create safety hazards, if the haulers were only paid by the ton. (*Id.* ¶ 22). Additionally, Kelly demanded this change to comply with BP and Mehoopany Wind Energy's internal procedures. (*Id.* ¶ 23).

***9** Subsequent to this meeting, plaintiff and Wondra agreed to modify their initial oral agreement. (*Id.* ¶ 24). Wondra agreed to pay plaintiff by the ton **as well as by the hour** so as to ensure the continued safety of all parties involved in the project. (*Id.* ¶ 25) (emphasis added). In exchange for slower and safer hauling, Wondra agreed and promised that it would pay plaintiff five dollars ($5.00) to seven dollars ($7.00) per ton and seventy-five dollars ($75.00) to ninety dollars ($90.00) an hour for truck time. (*Id.* ¶¶ 25–26).

Plaintiff, in turn, modified the payment arrangements with its subcontractors. Specifically, plaintiff made arrangements to pay its own subcontractors an hourly rate between seventy-five dollars ($75.00) and ninety dollars ($90.00). (*Id.* ¶ 28). Plaintiff made it clear, however, that the subcontractors would no longer receive a tonnage rate in addition to truck time. (*Id.*) Plaintiff alleges that it was more expensive to pay its subcontractors at an hourly rate than it was to pay by the ton as originally agreed. (*Id.* ¶ 29).

Plaintiff performed its duties pursuant to the oral agreement and oral modification and submitted invoices to Wondra in June and July 2012. (*Id.* ¶¶ 30–31). Plaintiff alleges Wondra failed to remit full and complete payment even though RES and/or BP, Mehoopany Wind Energy and Sempra paid Wondra. (*Id.* ¶¶ 34, 36). Plaintiff claims the unpaid invoices amount to $1,911,382.91. (*Id.* ¶ 35).

Viewing plaintiff's allegations as true, the court will find that plaintiff has properly pled a breach of contract claim for both the original oral agreement and oral modification against Wondra. Plaintiff's amended complaint sets forth "sufficient factual matter" establishing the existence of an oral agreement and oral modification. *See Iqbal,* 556 U.S. at 677. As such, the court will deny Wondra's motion to dismiss plaintiff's breach of contract claim.

B. Promissory estoppel

Wondra next moves to dismiss plaintiff's promissory estoppel claim contending that plaintiff has failed to sufficiently allege a promise. Because Wondra's promissory estoppel arguments are almost identical to their breach of contract contentions, the analysis given above is equally applicable here. Ergo, the court will deny Wondra's motion to dismiss plaintiff's promissory estoppel claim.

C. Agency relationship

Wondra moves to dismiss plaintiff's "agency relationship" claim because it is not a recognized cause of action under Pennsylvania law. Rather, an agency relationship can only be used to attribute liability under separate, recognized causes of action. Plaintiff argues that agency relationship is a viable cause of action under Pennsylvania law. The court will grant Wondra's motion to dismiss this claim for the same reasons set forth in section I.B.3. *supra.* [9]

9 The court will dismiss this claim with prejudice as an amendment would be futile. *See Alston,* 363 F.3d at 235 (holding that district courts must permit a curative amendment within a set period of time unless such an amendment would be inequitable or futile)

D. Unjust enrichment

Wondra also moves to dismiss plaintiff's unjust enrichment claim. Wondra argues that Pennsylvania law precludes plaintiff from pleading unjust enrichment as an alternative to plaintiff's breach of contract claim. Plaintiff claims that Pennsylvania law allows an unjust enrichment claim to be pled in the alternative to a breach of contact claim. The court agrees with plaintiff.

***10** Courts in Pennsylvania have continually recognized that a litigant may advance alternative or conflicting theories of recovery, including causes of action for breach of contract and unjust enrichment. *See Lugo v. Farmers Pride, Inc.,* 967 A.2d 963, 970 n. 5 (Pa.Super.Ct.2009) (stating that unjust enrichment may be pleaded in the alternative to a breach of contract claim); *see also Halstead v. Motorcycle Safety Found., Inc.,* 71 F.Supp.2d 455, 459 (E.D.Pa.1999) (finding that while Pennsylvania law precludes recovery on an unjust enrichment claim when a valid contract exists, plaintiffs are free to pursue alternative theories of recovery). Moreover, the Federal Rules of Civil Procedure allow for the pleading of alternative theories in the same complaint, even if those theories are inconsistent. *See* FED. R. CIV. P. 8(d) (stating that "[a] party may state as many separate claims ... regardless of consistency."); *see also Reynolds v. Univ. of Pa.,* 747 F.Supp.2d 522, 541–42 (E.D.Pa.2010) (noting that the contract must be found to be enforceable for an unjust enrichment claim to be excluded). Accordingly, the court will find that plaintiff is not foreclosed from pleading alternative causes of action sounding in breach of contract and unjust enrichment. Wondra's motion to dismiss plaintiff's unjust enrichment claim will, therefore, be denied.

E. Pennsylvania Contractor and Subcontractor Payment Act

Finally, Wondra seeks the dismissal of plaintiff's claim pursuant to Pennsylvania's Contractor and Subcontractor Payment Act (hereinafter "CASPA"). 73 PA. STAT. ANN.. §§ 501 *et seq.* Under CASPA, "[p]erformance by a contractor or a subcontractor in accordance with **the provisions of a contract** shall entitle the contractor or subcontractor to payment from the party with whom the contractor or subcontractor has contracted." *Id.* at § 504 (emphasis added). A "construction contract" is "[a]n agreement, whether written or oral, to perform work on any real property located within this Commonwealth." *Id.* at § 502. "Real property" is defined as "[r]eal estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon." *Id.* Subcontractors are only entitled to payment from "the party with whom the subcontractor has contracted." *Id.* at § 507(a).

In the instant case, the court has previously determined that plaintiff has sufficiently alleged the existence of an oral contract and oral modification between plaintiff and Wondra. Because the existence of a contract gives rise to liability under CASPA, the court will deny Wondra's motion to dismiss plaintiff's CASPA claim.

III. RES motion to dismiss

RES moves to dismiss plaintiff's amended complaint on the following five grounds: First, plaintiff's breach of contract claim should be dismissed because plaintiff has failed to plead the essential terms of the oral agreement. Second, plaintiff has failed to allege that RES ever made a promise, which requires dismissal of plaintiff's promissory estoppel claim. Third, plaintiff's "agency relationship" claims fails because an agency relationship is not a viable cause of action under Pennsylvania law. Fourth, plaintiff's claim for unjust enrichment fails because plaintiff, as a subcontractor, cannot recover against RES, a third party, absent some contractual agreement with or misleading by RES. Fifth, plaintiff's Contractor and Subcontractor Payment Act claim should be dismissed because plaintiff failed to allege the existence of an enforceable contract with RES. The court will address RES's contentions in turn.

A. Breach of contract

***11** RES first moves to dismiss plaintiff's breach of contract claim. RES contends that plaintiff has failed to plead the essential terms of the offer, acceptance and consideration of the alleged oral agreement. Plaintiff avers that it has properly pled a breach of contract claim against RES. After careful consideration, the court agrees with plaintiff.

As previously stated, parties asserting claims for breach of contract must allege the following three elements to adequately state a claim pursuant to Pennsylvania law: "(1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages." *Alpart,* 574 F.Supp.2d at 502 (citing *CoreStates Bank, N.A.,* 723 A.2d at 1058). Although every term of a contract need not be stated in complete detail, every element must be specifically pleaded. *Cutillo,* 723 A.2d at 1058. Clarity in the pleadings is "particularly important where an oral contract is alleged." *Pa. Supply, Inc.,* 895 A.2d at 600 (citations omitted).

In the instant action, plaintiff claims that it entered into a separate and distinct oral agreement with RES in June 2012. (Am.Compl.¶ 37). Specifically, RES agreed and promised to pay plaintiff to provide both the necessary stone material and deliver this material for the completion of the roadways within the project. (*Id.* ¶¶ 37–38). This stone material was in addition to and separate from the work and materials plaintiff was to provide pursuant to plaintiff's oral agreement and oral modification with Wondra. (*Id.* ¶ 40).

RES agreed to pay plaintiff ten dollars and fifty cents ($10.50) for each ton of stone material delivered and plaintiff's drivers eighty dollars ($80.00) an hour for any downtime experienced while on the project site. (*Id.* ¶ 37). Plaintiff provided $115,705.63 in materials and services for the project at the direction and request of RES. (*Id.* ¶ 41). RES accepted plaintiff's materials and services. (*Id.* ¶ 42). BP, Mehoopany Wind Energy and Sempra have paid RES for work related to the project. (*Id.* ¶ 46). RES, however, has refused to pay plaintiff. (*Id.* ¶¶ 43–44).

Viewing plaintiff's allegations as true, the court will find that plaintiff has properly pled the existence of a contract with RES. Plaintiff states the oral agreement's terms, nature of acceptance and the consideration exchanged. Additionally, plaintiff sufficiently alleges that RES breached this oral agreement by refusing to pay plaintiff. In short, plaintiff's amended complaint sets forth "sufficient factual matter" establishing the existence of an oral agreement with RES. *See Iqbal,* 556 U.S. at 677. As such, the court will deny RES's motion to dismiss plaintiff's breach of contract claim. [10]

10 RES also asserts that a party not named in the present action, RES Earth and Cable, LLC ("REC") was the project's general contractor and not RES. The court notes that our assessment rests heavily on the procedural posture of this litigation. Plaintiff has had no opportunity for discovery as to RES's ownership structures. It may well be that a fully developed factual record will preclude a finding that RES is liable. Under these circumstances, however, the court cannot say that plaintiff's amended complaint fails to state a claim upon which relief can be granted.

B. Promissory estoppel

RES next moves to dismiss plaintiff's promissory estoppel claim contending that plaintiff has failed to sufficiently allege a promise. Because RES's promissory estoppel arguments are almost identical to their breach of contract contentions, the analysis given above is equally applicable here. Ergo, the court will deny Wondra's motion to dismiss plaintiff's promissory estoppel claim.

C. Agency relationship

***12** RES moves to dismiss plaintiff's "agency relationship" claim because an agency relationship is not a viable cause of action under Pennsylvania law. Rather, an agency relationship can only be used to attribute liability under separate, recognized causes of action. The court will grant RES's motion to dismiss this claim for the same reasons set forth in section I.B.3. *supra.* [11]

11 The court will dismiss this claim with prejudice as an amendment would be futile. *See Alston,* 363 F.3d at 235 (holding that district courts must permit a curative amendment within a set period of time unless such an amendment would be inequitable or futile)

D. Unjust Enrichment

RES next moves to dismiss plaintiff's unjust enrichment claim. Pennsylvania courts have held that "[u]njust enrichment is essentially an equitable doctrine." *Styer,* 619 A.2d at 350. A plaintiff alleging unjust enrichment must establish the following elements: "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) the defendant's acceptance and retention of the benefit 'under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.' " *Giordano,* 714 F.Supp.2d at 530 (quoting *Filippi,* 968 A.2d at 242). Under these circumstances, "the law implies a contract between the parties pursuant to which the plaintiff must be compensated for the benefits unjustly received by the defendant." *Styer,* 619 A.2d at 350. The existence of such a contract "requires that the defendant pay the plaintiff the value of the benefits conferred ...." *Id.*

Here, plaintiff has pled that, over the course of its work on the project, it performed services and received instruction from Mehoopany Wind Energy, RES and Wondra. (*See* Am. Compl. ¶¶ 48–61). Plaintiff pled that these services were accepted and benefitted Mehoopany Wind Energy, RES and Wondra. (*Id.* ¶¶ 123–25). Moreover, at RES's specific request, plaintiff provided $115,705.63 in materials and services to RES. (*Id.* ¶¶ 37–41). RES, however, has not paid plaintiff. (*Id.* ¶¶ 45, 126). Given these facts, the reasonable inference that RES is liable to plaintiff under the equitable theory of unjust enrichment can be drawn; thus satisfying federal pleading standards. Ergo, the court will decline to dismiss plaintiff's unjust enrichment claim at such an early stage in the proceeding.

E. Pennsylvania Contractor and Subcontractor Payment Act

Finally, RES seeks the dismissal of plaintiff's Pennsylvania Contractor and Subcontractor Payment Act (hereinafter "CASPA") claim. 73 PA. STAT. ANN.. §§ 501 *et seq.* Under CASPA, "[p]erformance by a contractor or a subcontractor in accordance with **the provisions of a contract** shall entitle the contractor or subcontractor to payment from the party with whom the contractor or subcontractor has contracted." *Id.* at § 504 (emphasis added). A "construction contract" is "[a]n agreement, whether written or oral, to perform work on any real property located within this Commonwealth." *Id.* at § 502. "Real property" is defined as "[r]eal estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon." *Id.* Subcontractors are only entitled to payment from "the party with whom the subcontractor has contracted." *Id.* at § 507(a).

***13** In the instant action, the court has previously determined that plaintiff has sufficiently alleged the existence of an oral contract with RES and breach thereof. Because the existence of a contract gives rise to liability under CASPA, the court will deny RES's motion to dismiss plaintiff's CASPA claim.

Conclusion

For the reasons set forth above, the court will dismiss BP and Sempra from this action. The court will also dismiss Count Six-tortious interference with a contract and Count Seven-agency relationship with prejudice as these claims are futile under Pennsylvania law. Because the court will dismiss Counts Six and Seven, the court will deny Mehoopany Wind Energy and RES's motions to strike these claims as moot.

Therefore, the remaining parties and claims are: Count One—breach of contract against Wondra; Count Two—breach of contract against RES; Count Three—promissory estoppel against Wondra; Count Four

—promissory estoppel against RES; Count Five—promissory estoppel against Mehoopany Wind Energy; Count Eight—unjust enrichment against Wondra, RES and Mehoopany Wind Energy; Count Nine—CASPA claim against Wondra; Count Ten—CASPA claim against RES; and Count Eleven—breach of contract against Zurich and Fidelity. An appropriate order follows.

ORDER

AND NOW, to wit, this 10th day of April 2014, defendants' motions to dismiss plaintiff's amended complaint (Docs. 56, 58 & 62) are **GRANTED** in part and **DENIED** in part as follows:

1. BP Wind Energy North America, Inc. and Sempra U.S. Gas & Power's motion to dismiss is **GRANTED** to the extent that BP Wind Energy North America, Inc. and Sempra U.S. Gas & Power are **DISMISSED** from this action;

2. Mehoopany Wind Energy's motion to dismiss plaintiff's tortious interference with a contract claim, Count Six, is **GRANTED.** Count Six is **DISMISSED** with prejudice;

3. Mehoopany Wind Energy, RES and Wondra's motions to dismiss plaintiff's agency relationship claim, Count Seven are **GRANTED.** Count Seven is **DISMISSED** with prejudice;

4. The motions to dismiss are **DENIED** in all other respects; and

5. Mehoopany Wind Energy and RES's motions to strike Counts Six and Seven from plaintiff's amended complaint (Docs.54, 59) are **DENIED as MOOT.**

All Citations

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NON–PRECEDENTIAL DECISION—
SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

Mary Beth SPUHLER, Appellant
v.
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY, Appellee.

No. 911 MDA 2014.
|
Filed Oct. 1, 2015.

Appeal from the Order Entered April 28, 2014, In the Court of Common Pleas of Cumberland County, Civil Division at No.: 2013–02696.

BEFORE: SHOGAN, J., WECHT, J., and STRASSBURGER, J. *

* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY WECHT, J.:

***1** Mary Beth Spuhler appeals from the trial court's April 28, 2014 order sustaining the preliminary objections of Massachusetts Mutual Life Insurance Company ("MMLIC"), MML Investor Services ("MMLIS"), Connecticut Mutual Life Insurance Company ("CMLIC"), and Matthew J. Dobbie d/b/a/ uFinancial Group ("Dobbie") and dismissing Spuhler's amended complaint. For the reasons that follow, we reverse.

The trial court set forth the following factual and procedural history:

> [Spuhler] is an adult individual residing at 422 Deerfield Road, Camp Hill, PA 17011. [Spuhler] is licensed to sell securities, retirement plans, insurance, and other financial products. As part of this occupation, [Spuhler] entered into a Career Contract with Dobbie on January 2, 2008. Under the Career Contract, [Spuhler] would serve under Dobbie, who is a general agent for MMLIC, as an insurance sales agent for MMLIC and CMLIC. The Career Contract contained the terms of the relationship. Similarly, [Spuhler] entered into a Representative's Agreement whereby [Spuhler] was registered to sell securities for MMLIS. During the course of their relationship, [Spuhler] maintained an office within Dobbie's headquarters, located in Camp Hill, Pennsylvania.
>
> Louis F. Grammes (hereinafter, "Grammes") was also an agent with Dobbie. [Spuhler] avers that Grammes was Dobbie's top-producing life insurance agent. [Spuhler] and Grammes had an oral agreement that they would split the commissions resulting from new clients that they secured jointly. [Spuhler] alleges that she would develop leads and Grammes would act as the closer. On January 23, 2011, [Spuhler] discovered that Grammes had written a life insurance policy for a principal of one of their joint clients as to which he would receive all of the commissions, a violation of their oral agreement. Subsequently, [Spuhler] discovered that there were other instances where Grammes directed 100% of the commission from joint clients to himself. [Spuhler] believes that the value of these converted commissions is in excess of $20,000.
>
> Between January and August of 2011, [Spuhler] confronted Grammes several times regarding the violations of their agreement. Subsequently, on July 22, 2011, Dobbie informed [Spuhler] that she would no longer be allowed to work from Dobbie's office due to her dispute with Grammes. As a result, [Spuhler] had to remove her personal belongings and files and establish a new office, which she believes to be a violation of her Career Contract.
>
> [Spuhler] further avers that, nearly a year after being told to leave Dobbie's office, she received a letter from Dobbie terminating her employment relationship with him, MMLIC, CMLIC, and MMLIS. The termination letter alleged that [Spuhler] had engaged in "selling away" [1] as well as other unspecified non-compliance and misbehavior. Within two hours of receiving the termination letter, [Spuhler] claims that she sent Dobbie documents proving that she did not engage in selling away. [Spuhler] contends that the selling away allegations are damaging to her career. [Spuhler] sought, without success, to affiliate with another Massachusetts Mutual agency so that she [c]ould continue to collect renewal commissions on existing sales and make new sales.

1 Spuhler's amended complaint explains that "selling away" refers to the sale of financial products not submitted to MMLIS. *See* Spuhler's Amended Complaint, 8/22/2013, at 7.

> ***2** Notwithstanding [Spuhler's] assertion that she provided Dobbie with proof that the selling away allegations were unfounded, Dobbie initially did nothing. Dobbie eventually issued a backdated termination letter that did not contain allegations of selling away after [Spuhler's] attorney threated MMLIC's chief counsel with litigation. Nonetheless, [Spuhler] has been unsuccessful in securing employment with another Mass Mutual agency. [Spuhler] avers that a Mass Mutual agency in Philadelphia wanted to hire her, but the MMLIS home offices directed the agency not to hire her because their database lists [Spuhler] as "do not hire." [Spuhler] avers that the do not hire designation was per Dobbie's direction and that no independent investigation took place to confirm any allegations.
>
> Trial Court Opinion ("T.C.O."), 4/28/2014, at 2–4 (record citations omitted).

On May 13, 2013, Spuhler filed a complaint against MMLIC, CMLIC, MMLIS, and Dobbie (collectively "Appellees"). Thereafter, Appellees filed preliminary objections. On August 22, 2013, Spuhler filed an amended complaint, which consisted of seven counts: breach of contract, conversion, civil conspiracy, unjust enrichment, breach of fiduciary duty, and two counts of tortious interference with business relations. The Appellees again filed preliminary objections. On March 21, 2014, Spuhler filed a motion for leave to file a second amended complaint.

On April 28, 2014, the trial court sustained Appellees' preliminary objections in the nature of a demurrer, dismissing Spuhler's amended complaint. Specifically, the trial court held that: (1) Spuhler's breach of contract claim failed as a matter of law because she was classified as an independent contractor and, therefore, could be terminated at will; (2) the existence of a written contract between the parties precluded Spuhler from asserting a claim for unjust enrichment; and (3) all of Spuhler's other claims were barred by the gist of the action doctrine. The trial court's April 28, 2014 order also dismissed as moot Spuhler's motion for leave to amend her complaint. Spuhler timely appealed.[2]

2 The trial court did not order, and Spuhler did not file, a concise statement of errors complained of on appeal pursuant to Pa.R . A.P.1925(b).

Spuhler presents six issues for our review:

1. Whether the trial court committed reversible error and abused its discretion in sustaining preliminary objections in the nature of demurrers and dismissing the complaint without allowing for leave to amend?

2. Whether the trial court committed reversible error and abused its discretion in sustaining preliminary objections in the nature of demurrers and dismissing the complaint without giving any consideration to a pending motion for leave to file [a] Second Amended Complaint?

3. Whether the facts and allegations of the complaint, together with inferences deducible therefrom, adequately state a claim for breach of contract?

4. Whether the trial court wrongfully dismissed the complaint on the basis that no breach of duty claim could survive termination of the at will employment contract?

***3** 5. Whether the trial court improperly dismissed the alternative claim for unjust enrichment?

6. Whether the trial court committed reversible error in dismissing the tort claims based on the gist of the action doctrine?

Spuhler's Brief at 5–6 (numbering modified for clarity).

The scope of our review of an order sustaining preliminary objections is plenary. *Solomon v. Gibson,* 615 A.2d 367, 368 (Pa.Super.1992). "In reviewing the grant of a demurrer, we are not bound by the inferences drawn by the trial court nor are we bound by its conclusions of law. Moreover, the novelty of a claim or theory, alone, does not compel affirmance of a demurrer." *Neff v. Lasso,* 555 A.2d 1304, 1305 (Pa.Super.1989).

> Our standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the

> appellate court must apply the same standard as the trial court.

De Lage Landen Fin'l Servs., Inc., v. Urban P'ship, LLC, 903 A .2d 586, 589 (Pa.Super.2006). "Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt." *Bower v. Bower,* 611 A.2d 181, 182 (Pa.1992).

> A demurrer admits as true all well-pleaded facts and all inferences reasonably deducible from them, but not any conclusions of law. Only if upon the facts averred, the law says with certainty that no recovery is permitted will this Court sustain the demurrer. Where a doubt exists as to whether a demurrer should be sustained, this should be resolved in favor of overruling it.

Buchanan v. Brentwood Fed. Sav. & Loan Ass'n, 320 A.2d 117, 120 (Pa.1974) (citations and internal quotation marks omitted); *Stahl v. First Penna. Banking & Trust Co.,* 191 A.2d 386, 389 (Pa.1963).

In her first and second issues, Spuhler argues that the trial court erred in dismissing her amended complaint without granting leave to amend, despite her pending motion requesting the same. Because we reverse the trial court's order sustaining Appellees' preliminary objections, we need not consider whether the trial court erred in issuing that order without first granting Spuhler's motion for leave to amend her complaint.

Spuhler's third and fourth issues challenge the trial court's dismissal of her breach of contract claim (Count I of Spuhler's amended complaint) as to all Appellees. In sustaining the Appellees' demurrers on this count, the trial court reasoned that Spuhler had failed to state a claim for breach of contract because, "[a]s a general rule, there is no common[-]law cause of action against an employer for termination of an at-will employment relationship." T.C.O. at 5 (citation omitted). The court further reasoned that, because the contracts at issue unambiguously provided that either party could terminate the employment relationship at any time, with or without cause, "it cannot be claimed that the [Appellees] breached a duty imposed by the contract." *Id.* at 6.

> ***4** A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. *See Gen. State Auth. v. Coleman Cable & Wire Co.,* 365 A.2d 1347, 1349 (Pa.Cmwlth.1976). While not every term of a contract must be stated in complete detail, every element must be specifically pleaded.

CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super.1999) (citations modified).

In her amended complaint, Spuhler averred that Dobbie breached the career contract when, *inter alia,* he "sought to take control of the client base that Spuhler had spent decades developing ." *See* Spuhler's Amended Complaint, 8/22/2013, at 9. Spuhler maintained that Appellees "materially breached the contracts by refusing to allow Spuhler to affiliate with another of its general agents, and thereby continue to service her existing clients and draw commissions from their accounts[ ] and sell additional Mass Mutual products to new clients." *Id.* Spuhler also alleged that Appellees breached the career contract when they required her to "return her key to the office, remove all files and materials from [Dobbie's] office, and set up her own private office from which she could continue to serve as a Mass Mutual/uFinancial agent." *Id.* at 6. Finally, Spuhler pleaded that, as a result of Appellees' breaches, she was deprived of "hundreds of thousands of dollars in commissions." *Id.* at 10.

Because Spuhler pleaded the essential terms of the agreement, a breach, and damages, she set forth a legally sufficient claim for breach of contract. Although the agreement provided that either party could terminate the contract, with or without cause, it also imposed additional rights and duties, some of which survived the termination of Spuhler's employment as an insurance sales agent. *See e.g., id.* Exh. A at ¶ 5 (providing for the payment of vested renewal commissions after termination of the career contract). A fair reading of Spuhler's amended complaint reveals breach of contract allegations that extend beyond the assertion that Dobbie wrongfully terminated Spuhler's career contract. The trial court erred in reading Spuhler's amended complaint so narrowly that it concluded otherwise.

Spuhler's fifth issue challenges the trial court's dismissal of her claim for unjust enrichment, which she asserted against all defendants. "To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable for her to retain." *Torchia v. Torchia,* 499 A.2d 581, 582 (Pa.Super.1985). A claim for unjust enrichment arises from a quasi-contract. "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another." *AmeriPro Search, Inc. v. Fleming Steel Co.,* 787 A.2d 988, 991 (Pa.Super.2001).

> ***5** The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Whether the doctrine applies depends on the unique factual circumstances of each case. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. Moreover, the most significant element of the doctrine is whether the enrichment of the defendant is *unjust.*

Stoeckinger v. Presidential Fin. Corp. of Delaware Valley, 948 A.2d 828, 833 (Pa.Super.2008) (emphasis in original).

Instantly, Spuhler's amended complaint alleged that Dobbie was unjustly enriched by his "hijacking" of Spuhler's clients and commission streams. *See* Spuhler's Amended Complaint, 8/22/2013, at 8, 13. According to Spuhler, "Dobbie appreciated the benefit of his acquisition of [her] clients and commission streams," which Spuhler estimated to be worth "hundreds of thousands of dollars." *Id.* at 10, 13. Nevertheless, the trial court held that Spuhler had failed to state a viable claim for unjust enrichment because "it is manifest that the relationship between [Spuhler] and Dobbie was governed by a written contract." T.C.O. at 9. The court cited *Wilson Area School District v. Skepton,* for the well established proposition that "the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract...." 895 A.2d 1250 (Pa.2006).

Spuhler argues that the Pennsylvania Rules of Civil Procedure specifically authorize a party to allege separate claims in the alternative. *See* Spuhler's Brief at 36 (citing Pa.R.C.P. 1020(c)). Although Spuhler concedes that a plaintiff may not recover for both unjust enrichment and breach of contract, she nevertheless maintains that such claims may be pleaded in the alternative. *Id.* at 38. We agree.

Spuhler was free to plead unjust enrichment as an alternative theory of liability. Such a claim provides a basis for recovery if Spuhler's career contract with Dobbie is found to be unenforceable, or in the event that the issue of Spuhler's right to continuing commissions following her termination falls outside of the scope of the contract.

This court has previously rejected the argument that a cause of action for breach of contract cannot be pleaded in the alternative with a claim for unjust enrichment because the former is predicated upon the existence of an express contract while the latter is predicated upon the non-existence of an express contract. *See Lugo v. Farmers Pride, Inc.,* 967 A.2d 963, 969–70 (Pa.Super.2009) (holding that "appellee's argument confuses the bar against recovering under both causes of action with a notion that pleading both causes of actions is also prohibited"). Indeed, we have held that a subcontractor can recover based upon unjust enrichment when it performed work outside of the scope of the parties' contractual provisions. *See Ruthrauff, Inc. v. Ravin, Inc.,* 914 A.2d 880 (Pa.Super.2006) (noting that the plaintiff asserted a "claim for unjust enrichment for work it performed outside any promises made in the written contractual documents"). Accordingly, the trial court erred in sustaining Appellees' preliminary objection to Count VI and dismissing Spuhler's unjust enrichment claims.

***6** In her final issue, Spuhler argues that the trial court committed reversible error in dismissing her tort claims based upon the gist of the action doctrine. The trial court—finding that Spuhler merely had reframed her ordinary breach of contract claims into tort claims—dismissed Counts III through V, and VII of Spuhler's amended complaint, wherein she asserted claims for tortious interference with business relations, conversion, civil conspiracy, and breach of fiduciary duty against both Dobbie and the Mass Mutual defendants. Specifically, the trial court reasoned that, because all of Spuhler's tort claims arose out of her employment contract, they were barred by the gist of the action doctrine. *See* T.C.O. at 8.

"The gist of the action doctrine bars a plaintiff from re-casting ordinary breach of contract claims into tort claims." *Mirizio v. Joseph,* 4 A.3d 1073, 1079 (Pa.Super.2010) (citation omitted). This court has explained the doctrine as follows:

> Although they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.... To permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.

Id. (quoting *eToll, Inc. v. Elias/Savion Advertising, Inc.,* 811 A.2d 10, 14 (Pa.Super.2002)). The gist of the action doctrine does not preclude an action in tort simply because it resulted from a breach of a contract. "To be construed as in tort, however, the wrong ascribed to defendant must be the gist of the action, the contract being collateral." *Id.* at 1080.

> The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.

Id. (citation omitted).

Recently, our Supreme Court approved of the above articulation of the gist of the action doctrine.

> If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—*i.e.,* a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort. *See Ash v. Cont'l Ins. Co.,* 932 A.2d 877, 885 (Pa.2007) (holding that action against insurer for bad [-]faith conduct pursuant to 42 Pa.C.S. § 8371 is for breach of a duty "imposed by law as a matter of social policy, rather than one imposed by mutual consensus"; thus, action is in tort); *see also* W. Page Keeton, *Prosser & Keeton on Torts* 656 (5th ed.1984) (reviewing extant case law, and noting the division therein between actions in tort and contract based on the nature of the obligation involved, observing that "[t]ort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others ... [which are] independent of promises made and therefore apart from any manifested intention of parties to a contract, or other bargaining transaction"). Although this duty-based demarcation was first recognized by our Court over a century and a half ago, it remains sound, as evidenced by the fact that it is currently employed by the high Courts of the majority of our sister jurisdictions to differentiate between tort and contract actions. We, therefore, reaffirm its applicability as the touchstone standard for ascertaining the true gist or gravamen of a claim pled by a plaintiff in a civil complaint.

* * * *

> ***7** [T]he mere existence of a contract between two parties does not, *ipso facto,* classify a claim by a contracting party for injury or loss suffered as the result of actions of the other party in performing the contract as one for breach of contract.

Bruno v. Erie Ins. Co., 106 A.3d 48, 68–69 (Pa.2014) (some citations omitted, others modified; footnotes omitted).

Viewing the facts contained in Spuhler's amended complaint as true—as our standard of review requires—the gist of the action doctrine does not bar Spuhler's tort claims. As set forth above, Spuhler's amended complaint alleged that, prior to informing her that she was being terminated as a uFinancial insurance sales agent, Dobbie sent letters to Spuhler's clients telling them that Spuhler was no longer affiliated with uFinancial, and that Spuhler's existing accounts would be reassigned to another agent. *See* Spuhler's Amended Complaint, 8/22/2013, at 7. Spuhler also alleged that Dobbie prevented her from accessing her client files. *Id.* at 8. Finally, Spuhler alleged that she was unable to obtain a broker contract with another Mass Mutual agent, because MMLIS, at Dobbie's direction, had assigned Spuhler a "do not rehire" designation in its database. *Id.* As a result, Spuhler was unable to collect any renewal commissions on her existing policies, and the insurance portfolio that she had built throughout her decades-long career was substantially devalued. *Id.*

Spuhler asserted claims for tortious interference with business relations, conversion, civil conspiracy, and breach of fiduciary duty based upon the above facts. These are not claims for breach of contract masquerading as tort claims. As in *Bruno, supra,* the gist of the action on these averments lies in tort, and the contract is collateral to the matters alleged. *Compare Mirizio,* 4 A.3d at 1079–80. It was not Spuhler's career contract *per se* that created a duty not to deprive Spuhler of possession of her property or to interfere with her prospective business relations; it is the law itself that imposes those duties. *See Bruno,* 106 A.3d at 70. Accordingly, the trial court erred in granting Appellees' preliminary objections as to Counts III through V and Count VII. The gist of the action doctrine did not warrant the dismissal of Spuhler's tort claims.

For the foregoing reasons, we reverse the order granting appellees' preliminary objections and dismissing Spuhler's amended complaint.

Order reversed. Case remanded. Jurisdiction relinquished.

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United States District Court,
M.D. Pennsylvania.

Elaine RICE, Individually and on behalf of others similarly situated, Plaintiff,
v.
ELECTROLUX HOME PRODUCTS, INC., Defendant.

No. 4:15–cv–00371.
|
Signed July 28, 2015.

Attorneys and Law Firms

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MEMORANDUM

MATTHEW W. BRANN, District Judge.

***1** Defendant Electrolux Home Products, Inc. ("Electrolux") has filed a Partial Motion to dismiss Plaintiff Elaine Rice's Complaint pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, (ECF No. 10), as well as a Motion to strike the putative "other states" subclass from the Complaint pursuant to Federal Rule of Civil Procedure Rule 12(f). (ECF No. 8).

This Court retains jurisdiction pursuant to 28 U.S.C. § 1332; consequently, Pennsylvania substantive law applies to Ms. Rice's state law claims. *E.g., Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 91–92, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). For the reasons discussed below, Electrolux's Motion to strike will be granted, while the Motion to dismiss is granted in part and denied in part.

I. BACKGROUND [1]

1 As discussed *infra,* the allegations presented in Ms. Rice's complaint are taken as true, and all inferences are construed in the light most favorable to Ms. Rice.

For nearly one-hundred years, Electrolux has designed, manufactured, assembled, and sold a wide range of home appliances. (ECF No. 1, ¶ 18). During that time, Electrolux has become a global leader in home appliances, selling more than fifty million products in over one-hundred fifty counties every year. *Id.* Among the home appliances that Electrolux manufactures and sells are microwave ovens which Electrolux sells on its website and through third party retailers, including Lowe's Home Improvement ("Lowe's"). *Id.* at ¶ 22.

Among the microwave ovens sold by Electrolux are various versions of a stainless steel, over-the-range microwave (the "Microwaves"). *Id.* at ¶ 23. These Microwaves are designed to be installed on a vertical wall directly above the cooking surface of a stovetop. *Id.* at ¶ 2. Ms. Rice purchased one version of the Microwave, model number FGMV174KFC. *Id.* at ¶ 10. Each Microwave features a stainless steel handle, which as of December 4, 2014, featured part number 5304471830. *Id.* at ¶ 3.

These Microwaves contain a serious defect due to the stainless steel handle; when installed at the recommended height, the Microwave handle absorbs heat and can reach temperatures exceeding 168 degrees Fahrenheit. *Id.* When tests were conducted on Ms. Rice's Microwave, the handle temperature exceeded 168 degrees Fahrenheit in the time it took to bring water to a boil. *Id.* at ¶ 4. Skin contact with metallic surfaces which exceed temperatures of 154 degrees Fahrenheit causes burns resulting in irreversible injury. *Id.* at ¶ 28. Such injuries are preventable through the use of proper insulation or other protective measures. *Id.* at ¶ 29.

Ms. Rice purchased her Microwave from Lowe's on October 13, 2013 for $269.10, and paid an additional $180 to have the Microwave professionally installed in her home in accordance with the Installation Instructions provided by Electrolux. [2] *Id.* at ¶¶ 31–32. At some point thereafter, Ms. Rice was cooking on her stovetop and reached for the Microwave handle to open the door. *Id.* at ¶ 35. The temperature of the handle had reached an "exceedingly high" temperature, resulting in burns to Ms. Rice's hand. *Id.* at ¶ 36.

2 The Microwave is covered by a one-year, limited warranty pursuant to which "Electrolux will pay all costs for repairing or replacing any parts of [the Microwave] that prove to be defective in materials or workmanship when [the Microwave] is installed, used and maintained in accordance with the provided instructions." (ECF No. 1, ¶ 50). Ms. Rice relied on this warranty. *Id.* at ¶ 53.

***2** Ms. Rice contacted Electrolux's customer service regarding the injury. *Id.* at ¶ 37. In response, Electrolux arranged for a service representative from Baker Appliance Repair, LLC ("Baker Appliance") to inspect Ms. Rice's Microwave. *Id.* at ¶ 38. After inspecting the Microwave, the Baker Appliance worker informed Ms. Rice that her Microwave had been installed too close to the surface of her stovetop. *Id.* at ¶ 39. Despite the Installation Instructions calling for the Microwave *top* to be installed thirty inches from the stovetop surface, as Ms. Rice has done, the Baker Appliance worker asserted that the Microwave *base* must be thirty inches from the stovetop surface. *Id.* at ¶ 39–40.

On January 21, 2014, Ms. Rice sent an e-mail to a customer service Supervisor at Electrolux's corporate office, informing them of the alleged defect and requesting a refund or replacement of the Microwave. *Id.* at ¶ 41. On January 22, 2014, Ms. Rice was informed that Electrolux would not offer her a refund or replacement. *Id.* at ¶ 42. Electrolux further informed Ms. Rice that the Baker Appliance worker "was correct concerning the dimensions necessary for proper installation" of the Microwave. *Id.* On February 28, 2014, Electrolux mailed a letter to Ms. Rice denying her claim. *Id.* at ¶ 43.

On February 18, 2015, Ms. Rice filed a complaint with this Court, alleging eight counts: (1) declaratory relief pursuant to 28 U.S.C. § 2201, *et seq.;* (2) strict liability for a design defect and failure to warn; (3) negligent failure to warn; (4) violation of the Magnuson–Moss Consumer Products Warranties Act ("Warranties Act"); (5) breach of implied warranty of merchantability; (6) breach of express warranty; (7) unjust enrichment; and (8) strict liability for a design defect and failure to warn, resulting in personal injuries. (ECF No. 1). In addition to bringing personal claims, Ms. Rice asserts a class action for three putative classes. *Id.* Under Federal Rule of Civil Procedure Rule 23(b)(2) and (3), Ms. Rice asserts two putative State Sub–Classes, defined as:

> Pennsylvania: All persons in the Commonwealth of Pennsylvania who own a Microwave with a stainless steel handle (Part # 5304471830) purchased during the four (4) years preceding the filing of this action;
>
> and/or,
>
> Other States: All persons in the States of Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Kansas, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming who own a Microwave with a stainless steel handle (Part # 5304471830) purchased during the four (4) years preceding the filing of this action.
>
> Excluded from the State Sub–Classes are officers, representatives, or agents of Defendant, as well as the judge presiding over this case and his or her immediate family members. In addition, notwithstanding the foregoing, all claims for personal injury and wrongful death are excluded from the Class.

***3** *Id.*

II. DISCUSSION

A. Motion to Dismiss Under Rule 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must view all allegations stated in the complaint as true and construe all inferences in the light most favorable to plaintiff. *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993). However, "the tenet that a court must accept as true all of the [factual] allegations contained in the complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* At the motion to dismiss stage, the court considers whether the plaintiff is entitled to offer evidence to support its allegations. *Maio v. Aetna, Inc.,* 221 F.3d 472, 482 (3d Cir.2000).

A complaint should only be dismissed if, accepting as true all of the allegations in the amended complaint, the plaintiff has not pled enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 561, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 663–64.

Rule 8 of the Federal Rules of Civil Procedure "requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds on which it rests[.]' " *Twombly,* 550 U.S. at 554 (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). However, even under this lower notice pleading standard, a plaintiff must make a factual showing of entitlement to relief by alleging sufficient facts that, when taken as true, suggest the required elements of a particular legal theory. *See Twombly,* 550 U.S. at 561. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "shown"—"that the pleader is entitled to relief." *Iqbal,* 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)). A court may dismiss a claim under Rule 12(b)(6) where there is a "dispositive issue of law." *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

1. *Strict Liability and Negligent Failure to Warn*

Electrolux argues that Counts Two and Three of Ms. Rice's Complaint, alleging strict liability and negligent failure to warn, respectively, are barred by the economic loss doctrine. (ECF No. 11). Alternatively, Electrolux contends that, even if Ms. Rice had stated a claim for non-economic damages, any claim for purely economic damages should be dismissed. *Id.*

In Pennsylvania, the economic loss doctrine "bar[s] a plaintiff from recovering purely economic losses suffered as a result of a defendant's negligent or otherwise tortious behavior, absent proof that the defendant's conduct caused actual physical harm to a plaintiff or his property." *Ellenbogen v. PNC Bank,* 731 A.2d 175, 188 n. 26 (Pa.Super.Ct.1999). "Tort product liability theories impose responsibility on the supplier of a defective product whenever it causes personal injury or damage to other property because this is deemed to be the best way to allocate the risk of unsafe products and to encourage safer manufacture and design." *REM Coal Co. v. Clark Equip. Co.,* 386 Pa.Super. 401, 563 A.2d 128, 129 (Pa.Super.Ct.1989). Thus, "while tort recovery is barred for damage a product causes to itself, such recovery is available for damage the failing product causes to [persons or] 'other property.' " *2–J Corp. v. Tice,* 126 F.3d 539, 542 (3d Cir.1997).

***4** Ms. Rice argues that Counts Two and Three state claims for economic and non-economic losses, and therefore the counts should not be dismissed. (ECF No. 16, pp. 6–7). The Court agrees. The plain language used throughout Counts Two and Three puts Electrolux on clear notice of claims for personal injury. For example, one paragraph asserts that Ms. Rice "suffered a burn when her hand touched the handle of the Microwave while the cooking range was in use below." (ECF No. 1, ¶ 94). Ms. Rice further alleged that the Microwave design "creates a risk of burns or other injuries when a consumer touches the handle." *Id.* at ¶ 95. Because Ms. Rice has alleged personal injury in Counts Two and Three, dismissal is inappropriate.

However, the Court agrees with Electrolux's argument that, in the alternative, any claims for purely economic loss must be dismissed from these counts. The Third Circuit has noted that "[a]s it originally developed, the economic loss doctrine provided that no cause of action could be maintained in tort for negligence or strict liability where the only injury was 'economic loss'-that is, loss that is neither physical injury nor damage to tangible property." *2–J Corp.,* 126 F.3d at 541. Although the contours of the doctrine have expanded over time, the definition remained relatively unchanged: "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage." *Sovereign Bank v. BJ's Wholesale Club, Inc.,* 533 F.3d 162, 175 (3d Cir.2008) (quoting *Adams v. Copper Beach Townhome Communities, L.P.,* 816 A.2d 301, 305 (Pa.Super.Ct.2003)) (internal quotation marks omitted).

Notably, the United States Supreme Court expanded the economic loss doctrine to provide that "tort recovery is barred for damage a product causes to itself [.]" *2–J Corp.,* 126 F.3d at 542 (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 866, 106 S.Ct.

2295, 90 L.Ed.2d 865 (1986)). Consequently, tort remedies are unavailable for costs of replacement for the damaged product; recovery of these costs properly rest in warranty law rather than tort law. *E. River,* 476 U.S. at 87273. The United States Court of Appeals for the Third Circuit and the Pennsylvania Superior Court have predicted that the Pennsylvania Supreme Court will adopt the *East River* holding. *See, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.,* 66 F.3d 604, 618–21 (3d Cir.1995); *REM Coal,* 563 A.2d at 132.

This case law clarifies that, although tort actions may be pursued for economic loss that occurs as a result of personal injury or damage to "other property," a party may not recover in tort for purely economic losses that result due to damage to the product itself. *See, e.g., E. River,* 476 U.S. at 872–73; *Seely v. White Motor Co.,* 63 Cal.2d 9, 18, 45 Cal.Rptr. 17, 403 P.2d 145, 151 (1965); *Emerson G.M. Diesel, Inc. v. Alaskan Enter.,* 732 F.2d 1468, 1474 (9th Cir.1984). Accordingly, the Court concludes that claims in tort for both economic and non-economic losses must be severed, with all economic losses resulting solely from damage to the product itself being dismissed from the tort claim. [3]

3 Pennsylvania precedent on this matter is surprising sparse. An exhaustive search of Pennsylvania court cases reveals only one Court of Common Pleas decision that has explicitly addressed this issue in any way. *See, Teledyne Technologies Inc. v. Freedom Forge Corp.,* No. 3398 MAYTERM 2000, 2002 WL 748898, at *14 (Pa.Com.Pl. Apr.19, 2002) ("courts first must define 'the product,' denying recovery for damages to the product itself, then must determine if there is damage to 'other property' for which the economic loss doctrine would *not* bar recovery").

***5** This interpretation of the economic loss doctrine comports with the purposes behind the adoption of the doctrine in Pennsylvania. In that regard, the economic loss doctrine acts "to place a check on limitless liability for manufacturers and establish clear boundaries between tort and contract law." *Werwinski v. Ford Motor Co.,* 286 F.3d 661, 680 (3d Cir.2002). The doctrine was created because

> the goals of tort theories of recovery are not implicated in a product malfunction case involving only economic losses. A contract action, on the other hand, is perfectly suited to providing an adequate remedy for such losses and recognizes the parties' ability to structure their relative liabilities and expectations regarding the product's performance by setting the terms of their contractual bargain.

REM Coal, 563 A.2d at 129. This was so because tort "products liability was developed primarily as a means by which consumers could be compensated for *personal injury and property damage* caused by defective products." *Indus. Unif. Rental Co. v. Int'l Harvester Co.,* 317 Pa.Super. 65, 71, 463 A.2d 1085, 1089 (1983) *overruled by REM Coal,* 386 Pa.Super. 401, 563 A.2d 128 (emphasis added).

"[W]here damage occurs to the product itself, such losses are based upon and flow from the purchaser's loss of the benefit of his bargain and his disappointed expectations as to the product he purchased" which is best redressed through warranty law. *Id.* As the Pennsylvania Superior Court has noted:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical

> injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

REM Coal, 563 A.2d at 130 (quoting *Int'l Harvester,* 463 A.2d at 1088).

This reasoning evidences a clear intent to bar any tort recovery for economic loss, instead opting to encourage recovery through readily available warranty actions, thereby preventing overlapping claims. Even if a different reading of the economic loss doctrine may be plausible, this Court will "opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently." *Werwinski,* 286 F.3d at 680 (citing *City of Philadelphia v. Beretta U.S.A. Corp.,* 277 F.3d 415, 421 (3d Cir.2002); *Home Valu, Inc. v. Pep Boys,* 213 F.3d 960, 965 (7th Cir.2000)).

***6** Consequently, any claim for economic damages related to the costs to repair or replace the allegedly defective Microwaves is dismissed from the Complaint. This raises a new issue, however; when claims for such economic damages are removed from Count Two, Count Eight becomes redundant. (*Compare* ECF No. 1, ¶¶ 86–110 with *id.* at ¶¶ 178–201).[4] Consequently, the Court will *sua sponte* exercise its authority under Rule 12(f) to strike Count Eight from the Complaint. *See, Thomas v. Sandstrom,* No. 1:09–CV–1557, 2009 WL 5111788, at *1 (M.D.Pa. Dec.16, 2009) (citing *Krisa v. Equitable Life Assur. Soc.,* 109 F.Supp.2d 316 (M.D.Pa.2000)).

4 Count Two seeks damages and other declaratory relief on behalf of Ms. Rice and the putative (b)(2) class, whereas Count Eight seeks damages for Ms. Rice alone due to personal injury resulting from the defect. Therefore, Count Two is duplicative of Count Eight, not the other way around.

2. *Breach of Express Warranty*

Electrolux moves to dismiss Count Six of the Complaint, alleging breach of an express warranty, on the grounds that Ms. Rice only alleges a design defect. (ECF No. 11). As Electrolux points out, the express warranty provided protection only against defects in materials and workmanship. *Id.* at p. 10. Alternatively, Electrolux contends that insufficient facts have been alleged to support a claim of defects in materials or workmanship. *Id.*

Without question, "[a] manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty." *Cipollone v. Liggett Group,* 505 U.S. 504, 526, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). "Accordingly, the 'requirement[s]' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed *by the warrantor.* " *Id.* (emphasis in original). *See also Rosci v. AcroMed, Inc.,* 447 Pa.Super. 403, 669 A.2d 959, 968 (Pa.Super.Ct.1995). Therefore, "[t]he parties to a contract, not the state, define the substantive obligations of the contract and ... each party's duties." *Rosci,* 669 A.2d at 967 (citing *Michael v. Shiley, Inc.,* 46 F.3d 1316, 1325 (3d Cir.1995)).

The express warranty provided by Electrolux covered "any parts of [the Microwave] that prove to be defective in materials or workmanship[.]" (ECF No. 1, ¶ 150). Ms. Rice explicitly alleges in her complaint that the Microwave was "defective in material and/or workmanship." *Id.* at ¶ 163. Based on this language, Ms. Rice has sufficiently alleged a breach of the express warranty.[5]

5 Most of Ms. Rice's allegations relate to a design defect, rather than a defect in materials, as they relate to Electrolux's failure to design a safe handle by either (1) using a different material, or (2) including insulation in the handle. (ECF No. 1, ¶¶ 3, 5. Other courts have noted that "[a] defect in material is a defect in quality ... [a] defect in workmanship is a defect in the way some part of the machine is constructed ... [d]esign, on the contrary, involves the overall plan of construction and operation." *Lombard Corp. v. Quality Aluminum Prods. Co.,* 261 F.2d 336, 338–39 (6th Cir.1958). *See also, Cooper v. Samsung Electronics Am., Inc.,* 374 F. App'x 250, 253 (3d Cir.2010) ("the plain language of the Warranty covers only 'manufacturing defects in materials and workmanship encountered in normal ... noncommercial use of this product' [whereas plaintiff] does not allege a manufacturing defect; indeed,

> he agrees his TV was *manufactured as designed* ") (emphasis added); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products,* 754 F.Supp.2d 1145, 1181 (C.D.Cal.2010) (a design defect "exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective"); *Mack Trucks, Inc. v. Borgwarner Turbo Sys., Inc.,* 508 F. App'x 180, 184 (3d Cir.2012); *Linden v. CNH Am., LLC,* 673 F.3d 829, 835 (8th Cir.2012); *Voelker v. Porsche Cars N. Am., Inc.,* 353 F.3d 516 (7th Cir.2003).

Although the Complaint primarily alleges facts consistent with a design defect rather than a defect in materials, at this stage in litigation the facts are insufficiently developed to allow the Court to reach a definitive conclusion on this point. Discovery is necessary to determine whether the defects in the Microwave go beyond a design defect and enter the ambit of a defect in materials. For example, it is possible that Electrolux designed the handle in such a way that it would not absorb heat, but a defect in the materials used resulted in the absorption of heat. These two competing theories, a design defect and materials defect, are likely mutually exclusive. However, in a products liability case it is simple impossible to determine prior to the conclusion of discovery which theory will ultimately prevail. *See, Alin v. Am. Honda Motor Co.,* No. CIV A 08–4825, 2010 WL 1372308, at *6 (D.N.J. Mar.31, 2010); *Spera v. Samsung Electronics Am., Inc.,* No. 2:12–CV–05412, 2014 WL 1334256, at *7 (D.N.J. Apr. 2, 2014); *Morris v. BMW of N. Am., LLC,* No. CIV.A. 13–4980, 2014 WL 793550, at *11 (D.N.J. Feb.26, 2014). Consequently, the motion to dismiss Count Six will be denied.

***7** For the same reason, Electrolux's motion to dismiss Count Five relating to a breach of an implied warranty of merchantability is likewise denied.[6] Furthermore, Electrolux has moved to dismiss Count Four of the Complaint, an alleged violation of the Warranties Act, on the sole ground that Ms. Rice failed to state claims of a breach of express or implied warranties. (ECF No. 11, p. 11). Because Ms. Rice's allegations of a breach of express and implied warranties survive, Electrolux's motion to dismiss Count Four is also denied.

6 The Court notes some disagreement between the parties as to whether a claim for a breach of an implied warranty of merchantability based on a design defect is allowed under Pennsylvania law. *See,* (ECF No. 11, p. 10; ECF No. 16, p. 14). However, because Ms. Rice alleges breach of an implied warranty of merchantability based on a manufacturing defect, the motion to dismiss must be denied, and the Court need not resolve the issue at this point in time.

3. *Unjust Enrichment*

Next, Electrolux moves to dismiss Count Seven, alleging unjust enrichment, on the grounds that an express warranty forms the basis of the parties' relationship and therefore a claim for unjust enrichment may not be sustained. (ECF No. 11, p. 12). Specifically, Electrolux contends that "there is no dispute that a valid express warranty exists" and therefore Ms. Rice may not plead unjust enrichment in the alternative. (ECF No. 21, pp. 12–13).

"[I]t has long been held in [Pennsylvania] that the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract, regardless of how 'harsh the provisions of such contracts may seem in the light of subsequent happenings.' " *Wilson Area Sch. Dist. v. Skepton,* 586 Pa. 513, 520, 895 A.2d 1250 (2006) (quoting *Third Nat'l & Trust Co. of Scranton v. Lehigh Valley Coal Co.,* 353 Pa. 185, 44 A.2d 571, 574 (1945)). As the Pennsylvania Supreme Court expounded, this "bright-line rule"

> has deep roots in the classical liberal theory of contract. It embodies the principle that parties in contractual privity ... are not entitled to the remedies available under a judicially-imposed quasi[-]contract [i.e., the parties are not entitled to restitution based upon the doctrine of unjust enrichment] because the terms of their agreement (express and implied) define their respective rights, duties, and expectations.

Id. (quoting *Curley v. Allstate Ins. Co.,* 289 F.Supp.2d 614, 620–21 (E.D.Pa.2003)) (alterations in original).

The ability to recover on two fatally inconsistent theories should not be confused with the ability to plead such theories. In that vein, the Pennsylvania Superior Court has held that parties may plead breach of contract claims as well as plead "in the alternative with a cause of action under a theory of unjust enrichment." *Lugo v. Farmers Pride, Inc.,* 967 A.2d 963, 970 (Pa.Super.Ct.2009).

However, "pleading both breach of contract and unjust enrichment is plausible only when the validity of the contract itself is actually disputed, making unjust enrichment a potentially available remedy." *Grudkowski v. Foremost Ins. Co.,* 556 F.App'x 165, 170 (3d Cir.2014) (citing *Montanez v. HSBC Mortg. Corp. (USA),* 876 F.Supp.2d 504, 515–16 (E.D.Pa.2012); *Premier Payments Online, Inc. v. Payment Sys. Worldwide,* 848 F.Supp.2d 513, 527 (E.D.Pa.2012)).

***8** It is undisputed that a written, express contract did exist in this instance. *See* (ECF No. 1, ¶¶ 50–60; *id.* at Ex. C). Furthermore, nothing in the Complaint impugns the validity of the contract. To be certain, Ms. Rice challenges the validity of "[a]ny contractual language contained in [Electrolux's] express warranty that attempts to limit or exclude remedies [.]" *Id.* at ¶¶ 144, 168. However, this does not call into question the validity of the contract and the warranty, but only questions the purported limits on remedies available under the contract. Even if Ms. Rice were to prevail on this issue, the remainder of the contract would remain valid, and therefore recovery under the quasi-contractual theory of unjust enrichment is prohibited. Consequently, Ms. Rice has failed to state a plausible claim for relief under a theory of unjust enrichment, and Count Seven of the Complaint will be dismissed.

4. *Declaratory Relief*

Under Counts One and Two, Ms. Rice has moved for declaratory relief pursuant to 28 U.S.C. § 2201, *et seq.,* alleging that the Court must settle five factual disputes: (1) whether the Microwaves are defective; (2) whether Electrolux knew or should have known of the defect; (3) whether Electrolux failed to adequately warn of the risks caused by the defect; (4) whether the express warranty covers the defective condition; and (5) whether an implied warranty provides coverage for the defect. (ECF No. 1, p. 20). Electrolux seeks dismissal of these Counts on the grounds that the underlying substantive claims fail on the merits or, in the alternative, that the request for declaratory relief in entirely duplicative of Ms. Rice's substantive claims and does not satisfy the purposes of declaratory relief. (ECF No. 11, p. 14).

Title 28 U.S.C. § 2201 provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." "In providing the remedy of a declaratory judgment it was the Congressional intent 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.' " *Interdynamics, Inc. v. Firma Wolf,* 698 F.2d 157, 164–65 (3d Cir.1982) (quoting *Dewey & Almy Chem. Co. v. Am. Anode, Inc.,* 137 F.2d 68, 69–70 (3d Cir.1943), *cert. denied,* 320 U.S. 761, 64 S.Ct. 70, 88 L.Ed. 454 (1943)).

The Third Circuit has repeatedly "emphasized that the Act should have a liberal interpretation, bearing in mind its remedial character and the legislative purpose." *Id.* In that regard, the Third Circuit had interpreted Section 2201 "as granting to the district court the discretion whether to award declaratory relief[.]" [7] *Id.* at 167 (citing *Bituminous Coal Operators' Ass'n, Inc. v. Int'l Union, United Mine Workers,* 585 F.2d 586, 596 (3d Cir.1978)). However, before a court may exercise this discretion, there must first be a case or controversy. Thus, the dispute must "be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and ... be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240–41, 57 S.Ct. 461, 81 L.Ed. 617 (1937)) (alterations in original).

7 In deciding whether to exercise jurisdiction, Courts should consider eight non-exhaustive factors. *See, Reifer v. Westport Ins. Corp.,* 751 F.3d 129, 146 (3d Cir.2014). The Court will not address its discretionary jurisdiction as Electrolux does not ask "this Court to dismiss the declaratory judgment claims based on the Court's discretionary powers." (ECF No. 21, pp. 1314).

***9** This requirement becomes somewhat complex when addressing requests for declaratory relief. As the United States Supreme Court has stated:

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult,

> if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

As other courts have noted, "[a] declaratory judgment is inappropriate solely to adjudicate past conduct." *Del. State Univ. Student Hous. Found. v. Ambling Mgmt. Co.,* 556 F.Supp.2d 367, 374 (D.Del.2008). "The real value of the [declaratory judgment] ... is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Rhodes v. Stewart,* 488 U.S. 1, 4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (quoting *Hewitt v. Helms,* 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)) (emphasis in original).

Electrolux's first argument, that Ms. Rice's substantive claims fail and therefore there is no case or controversy present, is unavailing. The Court has concluded that most of Ms. Rice's substantive claims survive a Rule 12(b)(6) motion, and therefore the request for declaratory relief is appropriately grounded in substantive rights.

The Court also rejects Electrolux's argument that the declaratory relief counts are duplicative of Ms. Rice's other claims. Although the claims presented in Counts One and Two are largely the same as the remaining counts of the Complaint, the relief sought is not. Ms. Rice's complaint seeks damages and an award of fees in Counts Three through Eight, but requests "equitable and injunctive relief" under Counts One and Two. (ECF No. 1, p. 38). Given the differing nature of the relief sought, at this stage in the litigation it cannot be said that the counts are wholly duplicative. This conclusion is buttressed by the fact that "federal courts have broad discretion in fashioning declaratory relief 'where it is appropriate[,]' " *Pa. Nurses Ass'n v. Com. of Pa.,* No. CIV. 86–1586, 1991 WL 120200, at *2 (M.D.Pa. Aug.4, 1988), and have power to grant any appropriate relief, "even if the party has not demanded such relief in his pleadings.' " *Davis v. Romney,* 490 F.2d 1360, 1367 (3d Cir.1974) (quoting Fed.R.Civ.P. 54(c)). Consequently, the relief ultimately granted for Counts One and Two may vary greatly from the relief granted under the remaining Counts, and dismissal is not appropriate at this time.

Finally, contrary to Electrolux's argument, Counts One and Two are consistent with the purposes of declaratory relief. It is true that a party "must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Lattaker v. Rendell,* 269 F.App'x 230, 233 (3d Cir.2008) (quoting *Bauer v. Texas,* 341 F.3d 352, 358 (5th Cir.2005)). Electrolux is also correct that the harm suffered by Ms. Rice appears to have occurred, and declaratory relief will not affect the relationship of the parties in the future. *Rhodes,* 488 U.S. at 4.

***10** However, the Complaint does allege possible harm to putative class action plaintiffs in the future. Electrolux has not recalled the allegedly defective Microwaves, and therefore individuals who have purchased the Microwaves remain at risk of physical injury. (ECF No. 1, ¶ 7). Consequently, Ms. Rice has alleged sufficient facts to support allegations that putative class members will suffer harm in the future. Declaratory relief is therefore warranted under the facts alleged in the Complaint, and Count One will not be dismissed.

5. *Statute of Limitations*

Lastly, Electrolux challenges Ms. Rice's assertion that any statute of limitations should be tolled due to fraudulent concealment of the Microwave defects. (ECF No. 11). Ms. Rice argues that she has pled sufficient facts to survive a motion for summary judgment. (ECF No. 16).

Equitable tolling works to "stop the statute of limitations from running where the claim's accrual date has already passed." *Weis—Buy Services v. Paglia,* 411 F.3d 415, 424 (3d Cir.2005). For equitable tolling to apply under a theory of fraudulent concealment, a plaintiff must establish that: "(1) the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) which prevented the plaintiff from recognizing the validity of his claim within the limitations period; and (3) where the plaintiff's ignorance is not attributable to his lack of reasonable due diligence in attempting to uncover the relevant facts ." *Cetel v. Kirwan Fin. Grp., Inc.,* 460 F.3d 494, 509 (3d Cir.2006). *See also, Molineux v. Reed,* 516 Pa.

398, 402–03, 532 A.2d 792 (1987). Such claims are "subject to the heightened pleading requirements of Fed.R.Civ.P. 9(b)." *Davis v. Grusemeyer,* 996 F.2d 617, 624, n. 13 (3d Cir.1993) *overruled on other grounds as stated in Rolo v. City Investing Co. Liquidating Trust,* 155 F.3d 644 (3d Cir.1998).

The facts alleged are insufficient to establish any entitlement to equitable tolling. Ms. Rice has alleged that Electrolux representatives affirmatively misrepresented the installation instructions for the Microwave, and actively misled Ms. Rice regarding her cause of action. However, the Complaint is devoid of any allegation that Electrolux's actions prevented Ms. Rice "from recognizing the validity of his claim within the limitations period [.]" *Cetel,* 460 F.3d at 509. Further, there is no dispute that Ms. Rice has filed this claim within the statute of limitations. Consequently, the allegations presented are insufficient to allege fraudulent misrepresentation, and any claim for equitable tolling is dismissed.

B. Motion to Strike Under Rule 12(f)

In addition to the Motion to dismiss, Electrolux also seeks to strike the putative "other states" subclass from the Complaint. (ECF No. 8). Electrolux argues that Ms. Rice, by definition, cannot be a representative of that subclass, and therefore the subclass must be stricken from the Complaint. (ECF No. 9).

***11** Rule 12(f) of the Federal Rules of Civil Procedure provides that a "court may strike from a pleading ... any redundant, immaterial, impertinent, or scandalous matter." While generally disfavored in early stages of litigation, "a district court will strike class action allegations without permitting discovery or waiting for a certification motion where the complaint and any affidavits clearly demonstrate that the plaintiff cannot meet the requirements for a class action." *Woodard v. FedEx Freight E., Inc.,* 250 F.R.D. 178, 182 (M.D.Pa.2008) (citing *Thompson v. Merck & Co., Inc.,* Nos. C.A. 01–1004, 01–1328, 01–3011, 01–6029, 02–1196, 02–4176, 2004 WL 62710, at *2 (E.D.Pa. Jan.6, 2004)).

In order to have standing to sue, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, ––––, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374 (2011) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). *See also, Hayes v. Wal–Mart Stores, Inc.,* 725 F.3d 349, 360 (3d Cir.2013) ("It is axiomatic that the lead plaintiff must fit the class definition").

Here, it is evident from the self-defined contours of the putative "other states" subclass that Ms. Rice is not a member of that class. The Complaint defines the "other states" subclass as including

> All persons in the States of Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Kansas, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming who own a Microwave with a stainless steel handle (Part # 5304471830) purchased during the four (4) years preceding the filing of this action.

(ECF No. 1, ¶ 63). In contrast, Ms. Rice is a resident of Pennsylvania. *Id.* at ¶ 9. Consequently, Ms. Rice is not an adequate representative of the putative "other states" subclass. *Hayes,* 725 F.3d at 360.

Ms. Rice argues that it is premature to decide the issue prior to class certification. (ECF No. 15, pp. 7–8). The point is well considered, but ultimately unavailing. The Court recognizes that, in general, "class certification issues are ... 'logically antecedent' to Article III concerns and themselves pertain to statutory standing, which may properly be treated before Article III standing." *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 831, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (internal citations omitted). However, in this instance it is plain from the face of the Complaint that Ms. Rice cannot represent the putative "other states" subclass, and it would be pointless to belabor discovery on this issue given the deficiencies in the Complaint. However, because the class is self-defined, amending the Complaint would not be futile, as Ms. Rice is able to simply redefine the subclasses. Therefore, Electrolux's

Motion to strike will be granted, and the "other states" subclass will be stricken with leave to amend.

III. CONCLUSION

***12** For the foregoing reasons, Electrolux's Motion to dismiss under Rule 12(b)(6) is granted in part and denied in part. Any claims for economic losses related to the costs to repair or replace the Microwaves in Counts Two and Three are dismissed with prejudice. Count Eight is stricken from the complaint with prejudice. Count Seven and any claims for equitable tolling are dismissed with leave to amend. Finally, Electrolux's Motion to strike the putative "other state" subclass is granted with leave to amend.

An appropriate Order will follow.

ORDER

AND NOW, in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion to Strike the "Other States" Subclass (ECF No. 8) is hereby **GRANTED** with leave to amend.

2. The Court will *sua sponte* **STRIKE** Count Eight **WITH PREJUDICE.**

3. Defendant's Motion to Dismiss (ECF No. 10) is **GRANTED IN PART** and **DENIED IN PART.** Any claims for economic losses related to the costs to repair or replace the Microwaves in Counts Two and Three are **DISMISSED WITH PREJUDICE.** Count Seven, as well as any claims for equitable tolling, are **DISMISSED WITHOUT PREJUDICE.**

4. Plaintiff may, within twenty-one (21) days of this Order, file an Amended Complaint addressing the deficiencies noted in the accompanying Memorandum.

5. Should Plaintiff fail to file an Amended Complaint within the required time period, the counts or causes of action that have been dismissed *without* prejudice will be dismissed *with* prejudice and plaintiff will be prohibited from redefining the putative classes.

All Citations

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United States District Court,
M.D. Pennsylvania.

Christopher BAINBRIDGE, et al., Plaintiffs
v.
OCWEN LOAN SERVICING, LLC, et al., Defendants

CIVIL ACTION NO. 3:16-CV-0411
|
Filed 03/30/2017

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MEMORANDUM

William J. Nealon, United States District Judge

***1** Plaintiffs, Christopher and Kelly Bainbridge, filed an amended complaint against Defendants U.S. Bank, N.A. as Trustee for the C-BASS Mortgage Loan Trust Asset-Back Certificates, Series 2007-CB6 ("U.S. Bank"); Udren Law Offices, P.C. ("Udren"); and Ocwen Loan Servicing, LLC ("Ocwen") (collectively "Defendants"). (Doc. 14). Plaintiffs allege that Ocwen and Udren violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"). (Id. at pp. 5-6). Plaintiffs also claim that Defendants made wrongful use of civil proceedings in violation of 42 Pa. C.S.A. § 8351, et seq. ("Dragonetti Act"), and violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, et seq. ("UTPCPL"). (Id. at pp. 6-9). On May 6, 2016, Udren filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and brief in support. (Docs. 21, 22). On May 16, 2016, U.S. Bank and Ocwen filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and brief in support. (Docs. 23, 24). On June 6, 2016, Plaintiffs filed their brief in opposition to the motions to dismiss. (Doc. 27). On June 20, 2016, Defendants filed a joint reply brief. (Doc. 28). As a result, the aforementioned motions to dismiss are ripe for disposition. For the reasons set forth below, Defendants' respective motions to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) will be denied in part and granted in part.

I. STANDARD OF REVIEW

As stated, both motions to dismiss have been brought pursuant to Federal Rule of Civil Procedure 12(b)(6). See (Docs. 21-24). "This rule provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted." Suessenbach Family v. Access Midstream, 2015 U.S. Dist. LEXIS 40900, at *2 (M.D. Pa. Mar. 31, 2015) (Mannion, J.). The moving party bears the burden of showing that no claim has been stated. Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005). All factual allegations are accepted as true and all inferences are construed in the light most favorable to the non-moving party. Kaymark v. Bank of Am., N.A., 2015 U.S. App. LEXIS 5548, at *7 (3d Cir. Apr. 7, 2015) (citing Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012)). "[D]ismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed to plead 'enough facts to state a claim to relief that is plausible on its face.' " Suessenbach Family, 2015 U.S. Dist. LEXIS 40900, at *2 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). The non-moving party's allegations must be sufficient to "raise a right to relief above the speculative level." Twombly, 550 U.S. at 544. "This requirement 'calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of' necessary elements of the plaintiff's cause of action." Suessenbach Family, 2015 U.S. Dist. LEXIS 40900, at *2-3 (quoting Twombly, 550 U.S. at 544). "Furthermore, in order to satisfy federal pleading requirements, the plaintiff must 'provide the grounds of his entitlement to relief,' which 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' " Id. (quoting Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)).

***2** "Generally, the court should grant leave to amend a complaint before dismissing it as merely deficient." Aspinall v. Thomas, 118 F. Supp. 3d 664, 670-71 (M.D. Pa. 2015) (Mannion, J.) (citing Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 252 (3d

Cir. 2007); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000)). "Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004).

II. FACTUAL ALLEGATIONS

Pursuant to the above-discussed motion to dismiss standard of review, all facts are taken from Plaintiffs' amended complaint, (Doc. 14), unless otherwise noted.

On February 7, 2008, Plaintiffs became the owners of the property located at 25 5th Street, Hawley, Pennsylvania 18428. (Id. at p. 2). "On or about March 28, 2007, Plaintiffs initiated a mortgage loan with Defendants' predecessor, Imperial Lending, LLC." (Id.). On or about November 4, 2010, Plaintiffs filed Chapter 13 bankruptcy in the United States District Court for the Middle District of Pennsylvania. (Id. at p. 3). On October 12, 2011, "Ocwen filed a Transfer of Claim document reflecting transfer of servicing rights" regarding Plaintiff's loan "from Litton Loan Servicing, L.P. to Ocwen." (Id.). Ocwen "acquired the servicing rights to the mortgage debt disputed herein from Litton Loan Servicing when alleged to be in default." (Id. at p. 2).

On July 18, 2013, U.S. Bank filed a motion in Plaintiffs' bankruptcy action "for relief from the stay alleging plaintiffs had not made post-petition monthly mortgage payments beginning February 1, 2013." (Doc. 14, p. 3). On August 8, 2013, the United States Bankruptcy Court for the Middle District of Pennsylvania "entered an order granting US Bank relief from the stay due to plaintiffs' bankruptcy counsel failing to respond to the motion without the knowledge of the plaintiffs." (Id.).

On June 26, 2014, "Defendants filed a complaint in mortgage foreclosure against Plaintiffs in Wayne County, Pennsylvania Court of Common Pleas." (Id.). In that foreclosure action, "Defendants alleged ... that plaintiffs had not made post-petition monthly mortgage payments beginning" on September 1, 2013. (Id.). Defendants "alleged that the aforesaid mortgage was in default in that the payment due on or about September 1, 2013, and alleged that all subsequent payments had not been made." (Id.). Plaintiffs "never missed a single payment after relief was granted to" U.S. Bank in the Plaintiffs' bankruptcy action until "Ocwen began returning plaintiffs' payments in January 2014." (Id.). Ocwen returned these payments "despite Plaintiffs having copies of checks and bank statements evidencing payment for every month alleged unpaid." (Id.). Additionally, "Defendants cashed the checks." (Id.).

Defendants instituted the underlying mortgage foreclosure action against Plaintiffs "without investigating the claimed default." (Id. at p. 4). Subsequent to the complaint being filed in the underlying mortgage foreclosure action, Plaintiffs "continually informed Defendants of their mistake." (Doc. 14, p. 4). Defendants, however, continued to pursue the foreclosure action. (Id.). On March 13, 2015, in the Wayne County Court of Common Pleas, the Honorable Raymond L. Hamill entered a verdict in favor of Plaintiffs and against Defendants in the underlying foreclosure action. (Id.).

***3** On or about October 7, 2015, Plaintiffs "received a discharge of their chapter 13 bankruptcy wherein they had paid $12,600 in pre-petition arrears to Ocwen and its predecessor servicer, Litton." (Id.). On or about that same date, Ocwen filed "a Response under BR 3002.1(g)" in Plaintiffs' bankruptcy action "alleging a post-petition mortgage loan default by plaintiffs for the months [of] December 1, 2013 through October 1, 2015 in the total amount of $36,851.75." (Id.).

Based on the foregoing, "Plaintiffs' credit has been damaged causing them to be unable to purchase a new truck ... [and they] also have been forced to rent rather than purchase a new home because they cannot qualify for an affordable mortgage." (Id.). Moreover, Plaintiffs spent "approximately $7,000 to retain attorneys" for their representation in the underlying mortgage foreclosure action. (Id.).

III. DISCUSSION

A. FDCPA

Both motions currently before the Court argue that Plaintiffs' FDCPA claims concerning the underlying foreclosure action are barred by the FDCPA's one (1) year statute of limitations. (Doc. 22, p. 7); (Doc. 24, pp. 1, 5, 6-8). According to Udren, "Plaintiffs claim that 'Defendants' violated the FDCPA by falsely filing a foreclosure action to take Plaintiffs' home and that 'Defendants' sent in and out-of-court correspondence concerning the amounts due." (Doc. 22, p. 7). However, Udren states that Plaintiffs provide "[n]o further specification." (Id.). Furthermore, Udren argues that since the FDCPA has a one-year (1) statute of limitations, "only alleged FDCPA violations occurring after March 8, 2015 are actionable in this proceeding." (Id.). Udren notes that the relevant "Foreclosure Action was filed on June 26, 2014," and "Plaintiffs filed an Answer on September 26, 2014." (Id.). Udren claims that the "[t]rial occurred [on] March 3, 2015." (Id.). Thus, Udren concludes, "[t]he alleged communications by Udren 'in and out of court' would have had to occur after March 8, 2015 to fall within the statute of limitations." (Id.). But, according to Udren, "[b]ecause all the conduct complained of possibly attributable to Udren occurred more than one (1) year before all of the above dates, it is not actionable under the FDCPA." (Id.).

Udren also argues that while Plaintiffs "make unsupported assertions that the purported FDCPA violations continued through the 'present date,' " they "cannot maintain a 'continuation of violation' theory to somehow toll the date of accrual of their FDCPA claim beyond June 26, 2014, the date of commencement of the mortgage foreclosure action or service of the Complaint on August 26, 2014." (Doc. 22, p. 8). Udren claims that "[i]t is well-settled that a specific date is affixed for the accrual of a purported FDCPA violation ... and the subsequent course of litigation is not actionable under a 'continuing violation' theory in the context of the FDCPA." (Id.) (quoting Schaffhauser v. Citibank (S.D.) N.A., 340 Fed.Appx. 128, 130 (3d Cir. 2009); citing Parker v. Pressler & Pressler, LLP, 650 F. Supp. 2d 326, 341 (D.N.J. 2009)).

Similarly, U.S. Bank and Ocwen argue that Plaintiffs' FDCPA claims are barred by the FDCPA's one-year (1) statute of limitations. (Doc. 24, p. 6). In particular, U.S. Bank and Ocwen claim that since the instant action was instituted on March 8, 2016, "no action taken prior to March 8, 2015 may form the basis of their claims against Ocwen and U.S. Bank." (Id.). According to U.S. Bank and Ocwen, even assuming, without deciding, that the limitations period began to run in September 2014, when Plaintiffs were served with the foreclosure complaint, the Plaintiffs' "FDCPA claims, premised on improper or 'false' allegations included in the Foreclosure Action, are clearly time-barred." (Doc. 24, p. 7).

***4** U.S. Bank and Ocwen also claim that "[a]ny acts taken or statements made by Ocwen or U.S. Bank in the course of the Foreclosure Action do not constitute 'continuing violations' of FDCPA that would re-start the limitations period." (Id.) (citing Schaffhauser, 340 Fed.Appx. at 130-31; Kimmel v. Phelan Hallinan & Schmeig, PC, 847 F. Supp. 2d 753, 767 (E.D. Pa. 2012); Schaffhauser v. Burton Neil & Assocs., P.C., 2008 U.S. Dist. LEXIS 24894 (M.D. Pa. Mar. 27, 2008) (Rambo, J.)).

Plaintiffs respond by arguing that their FDCPA claims concerning the underlying mortgage foreclosure action should be considered ripe when the foreclosure verdict was handed down in the underlying state court litigation. (Doc. 27-1, pp. 4-9). Plaintiffs ask the Court to craft "an exception" which would toll "the FDCPA claim from the time of filing or answer given the unique concerns of ripeness, judicial economy and important state interests involved in determining real property issues." (Id. at p. 5).

In support of their request that the Court adopt this exception to the FDCPA's statute of limitations, Plaintiffs first argue that judicial economy will be served by adopting this exception to the FDCPA's statute of limitations. (Id.). According to Plaintiff, "[t]he reasoning employed by Federal Courts considering abstention from state court determinations provides a foundation for [P]laintiff[s'] ripeness arguments." (Doc. 27-1, p. 5). Plaintiffs claim that courts within the Third Circuit that have considered "Younger abstention issues abstain where real property issues are involved." (Id. at p. 6). Moreover, Plaintiffs state that "[a]nother category of cases appropriate for abstention involves 'considerations of [wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " (Id.) (second alteration and emphasis in original) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)). Plaintiffs argue that "[i]nsofar as federal abstention doctrine dictates that any parallel FDCPA case arising from plaintiff's standing defense would require the case be stayed anyhow under the Colorado River abstention doctrine, judicial economy is served by" this Court's rejection the "argument that tolling of an FDCPA claim based on a foreclosure action is based on the time of that action's filing or service." (Id.).

According to Plaintiffs, the "Colorado River abstention provides that, under 'exceptional circumstances,' a federal court may abstain from its otherwise 'virtually unflagging obligation' to assert jurisdiction over a case because (1) there is a parallel case in state court, and (2) after 'careful[ly] balancing' a series of factors, maintaining the federal case would be a waste of judicial resources." (Id.) (alteration in original) (quoting Moses 4 H Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13-16, 19 (1983)). Plaintiffs argue that "[h]ere the two proceedings would have easily been considered parallel insofar [as] they 'involve the same parties and substantially identical claims, raising nearly identical allegations and issues,' and when plaintiffs in each forum seek the same remedies, i.e. here, determination as to the validity of the underlying debt in a foreclosure action." (Doc. 27-1, pp. 6-7) (internal citations omitted). Plaintiffs also claim that "five of the six factors clearly argue for abstention with the sixth, convenience of the federal forum, having a neutral effect." (Id. at p. 7).

***5** According to Plaintiffs, the argument put forth by Defendants "requires any foreclosure defendant opposing foreclosure for lack of a defaulted debt to file a parallel concurrent action to toll the FDCPA statute of limitations despite all Colorado River and Younger abstention factors arguing for federal court abstention." (Id. at p. 8). Moreover, Plaintiffs contend that:

> Extending the Motion's argument to the instant case's facts would have resulted in the consequent squandering of not only the state court's resources spent for years on a meritless state foreclosure claim, but would also have squandered the resources of the federal court to carry the FDCPA action on its docket as an active matter for such time.

(Id.). Plaintiffs also claim that:

> filing of an FDCPA claim in federal court against the foreclosing parties and their counsel within one (1) year of the foreclosure action's filing or service without regard for disposition of whether the debt is owed increases the danger of the borrower and his counsel having Rule 11 sanctions threatened thereby increasing the likelihood of multiplying the litigation.

(Doc. 27-1, p. 9).

Plaintiffs also make clear that they are not alleging a continuing violation theory under the FDCPA. (Id.). According to Plaintiffs:

> The case law underlying the Motion's argument that an FDCPA claim is broadly tolled by the initiation or service of the foreclosure complaint should be distinguished because it does not involve foreclosure or standing defense in the respective underlying collection actions as discussed above.

(Id.).

Initially, the Court notes that Plaintiffs' FDCPA claims are based on two (2) sections of the FDCPA and concern actions allegedly taken in two (2) separate legal proceedings. (Doc. 14, pp. 5-6). First, Plaintiffs contend that Ocwen violated 15 U.S.C. § 1692e(2)(A) of the FDCPA on October 7, 2015, when it "falsely fil[ed] a Response in the bankruptcy when no post-petition payments were due." (Id. at p. 5). Second, Plaintiffs allege that Ocwen and Udren violated section 1692e(2)(A) when they "falsely fil[ed] a foreclosure action to take [Plaintiffs'] home when [Plaintiffs] were not contractually in default under the Note for payments due." (Doc. 14, p. 5). Notably, Plaintiffs also allege generally that "Defendants violated § 1692f by engaging in unfair or unconscionable means to collect or attempt to collect a debt by the aforesaid conduct." (Id. at p. 6).

As to Plaintiff's FDCPA claims, Defendants' respective motions focus on Plaintiffs' allegations concerning the Defendants' filing of the underlying foreclosure action and, importantly, do not address Plaintiffs' claim regarding the "Response" allegedly filed by Ocwen on October 7, 2015, in the "bankruptcy." See (Doc. 22, pp. 2, 7-8); (Doc. 24, pp. 1-2, 6-7). Consequently, Plaintiffs' FDCPA claims under sections 1692e(2)(A) and 1692f based on the "Response" allegedly filed by Ocwen in the "bankruptcy" will be allowed to proceed.

However, Plaintiffs' claim that Ocwen and Udren violated sections 1692e(2)(A) and 1692f of the FDCPA when they filed the underlying mortgage foreclosure action will not proceed. Pursuant to section 1692k(d) of the FDCPA, "[a]n action to enforce any liability created by this title ... may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one [(1)] year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Here, Plaintiffs filed their original complaint on March 8, 2016. Therefore, under section 1692k(d), Plaintiffs' FDCPA claims which occurred before March 8, 2015, will be time barred.

***6** To determine whether Plaintiffs' FDCPA claims concerning the underlying mortgage foreclosure action are time barred, the Court must first decide when those claims began to accrue under the FDCPA's statute of limitations. According to the plain language of the FDCPA, the statute of limitations begins to accrue "from the date on which the violation occurs." 15 U.S.C. § 1692k(d). This plain reading is consistent with decisions reached by the United States Court of Appeals for the Third Circuit and the district courts within that jurisdiction. For example, in Schaffhauser v. Citibank, the Third Circuit noted that "[a]n action under the FDCPA must be brought 'within one year from the date on which the violation occurs.' " 340 Fed.Appx. 128, 130 (3d Cir. 2009) (quoting 15 U.S.C. § 1692k(d)). The Third Circuit went on to state that "[w]here FDCPA claims are premised upon allegations of improper pursuit of debt collection litigation,[footnote omitted] courts are split as to when the FDCPA's one-year statute of limitations begins to run...." Id. The Third Circuit continued by noting that "some have held that such claims accrue upon filing the underlying collection action, see Naas v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997), while others use the date on which the purported debtor was served with the complaint." Id. at 131 (citing Johnson v. Riddle, 305 F.3d 1107, 1113 (10th Cir. 2002)). Ultimately, the Third Circuit determined that it was not necessary to determine which approach applied because "under either approach" the plaintiffs' FDCPA claims were "clearly untimely." Schaffhauser, 340 Fed.Appx. at 131. Additionally, the Third Circuit also addressed the plaintiffs' argument that "the actions taken by the [ ] defendants 'constitute a continuing violation,' bringing their otherwise time-barred claims within FDCPA's one-year statute of limitations." Id. "However," the Third Circuit noted, the plaintiffs "offer no support for their contention that participation in ongoing debt collection litigation qualifies as a 'continuing violation' of the FDCPA, and we are aware of none." Id. According to the Third Circuit, at the time of its decision "the only circuit court decision addressing this issue has concluded precisely the opposite." Id. (citing Naas, 130 F.3d at 893). The Court of Appeals went on to state that "[g]enerally, our decisions have limited the continuing violation doctrine to the employment discrimination context." Id. (citing O'Connor v. City of Newark, 440 F.3d 125, 127-28 (3d Cir. 2006)). Finally, the Third Circuit declined to extend the "continuing violation doctrine" to an FDCPA claim relating to "state court debt collection actions." Id.

A number of district courts within the Third Circuit have found the Third Circuit's non-precedential decision in Schaffhauser to be persuasive, specifically to the extent it determined that the participation in the underlying state court action did not qualify as a continuing violation. For example, in Toritto v. Portfolio Recovery Assocs., LLC, 2016 U.S. Dist. LEXIS 45821 (D.N.J. Apr. 5, 2016), the United States District Court for the District of New Jersey recently addressed whether a plaintiff's claim that the defendants "violated the FDCPA by 'attempting to collect an alleged debt beyond the statute of limitations' in the state court action" was barred by the FDCPA's one-year (1) statute of limitations. Id. at *3. The District Court, in reaching its determination that the plaintiffs' claim was time barred, found Schaffhauser to be "persuasive and on point." Id. at *4. In particular, the District Court stated that "[a]s in Schaffhauser, [the plaintiffs'] claims in this case are 'premised upon allegations of improper pursuit of debt collection litigation.' " Id. at *5 (Schaffhauser, 340 Fed.Appx. at 130-31).

Additionally, in Kohar v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 49599 (W.D. Pa. Apr. 13, 2016), the United States District Court for the Western District of Pennsylvania noted that:

> The Court of Appeals and numerous District Courts have recognized that the one year statute of limitations associated with the FDCPA commences upon the invocation of the underlying

> foreclosure litigation and is not generally saved by the continuing litigation doctrine.

Id. at *11-12 (citing Schaffhauser, 340 Fed.Appx. at 131; Parker v. Nationstar Mortg. LLC, 2015 U.S. Dist. LEXIS 145439 (W.D. Pa. Oct. 27, 2015); Amelio v. McCabe, Weisberg & Conway, P.C., 2015 U.S. Dist. LEXIS 98378 (W.D. Pa. July 28, 2015)); see Rhodes v. US Bank Nat'l Assoc., 2017 U.S. Dist. LEXIS 27578, at *4 n.8 (E.D. Pa. Feb. 28, 2017) (citing Schaffhauser, 340 Fed.Appx. at 131); Living Life v. Deutsche Bank Nat'l Trust Co., 2016 U.S. Dist. LEXIS 50742, at *13 (E.D. Pa. Apr. 15, 2016) (citing Schaffhauser, 340 Fed.Appx. at 130-31).

In Brown v. Udren Law Offices PC, however, the United States District Court for the Eastern District of Pennsylvania distinguished the Third Circuit's decision in Schaffhauser. 2011 U.S. Dist. LEXIS 102004 (E.D. Pa. Sept. 9, 2011). The District Court rejected the defendant's reliance on Schaffhauser in its contention that the plaintiff's "FDCPA claim is barred by the one-year statute of limitations" and that the plaintiff "cannot assert a continuing violation...." Id. at *15-16. The District Court found that the plaintiff's FDCPA claim was not barred "by the statute of limitations because she ... alleged discrete acts that occurred within the year before she filed her Complaint." Id. at *16. The District Court noted that "FDCPA claims are predicated upon improperly bringing debt collection litigation, the one-year limitations period begins to run–at latest–when the debtor is served with process." Id. (citing Schaffhauser, 340 Fed.Appx. at 130-31). However, "[c]onduct which independently violates the FDCPA, however, is actionable if it falls within the limitations period, even if undertaken in pursuit of litigation that was filed outside the limitations period." Brown, 2011 U.S. Dist. LEXIS 102004, at *16 (citing Jones v. Inv. Retrievers, LLC, 2011 U.S. Dist. LEXIS 44138 (M.D. Pa. Apr. 25, 2011) (Caputo, J.)).

***7** Here, Plaintiffs allege, in relevant part, that Defendants violated section 1692e(2)(A) of the FDCPA when "[b]oth defendants[, Ocwen and Udren,] falsely fil[ed] a foreclosure action to take plaintiff[s'] home when plaintiffs were not contractually in default under the Note for payments due." (Doc. 14, p. 5). Plaintiffs also allege that "Defendants violated § 1692f by engaging in unfair or unconscionable means to collect or attempt to collect a debt by the aforesaid conduct." (Id. at p. 6). As alleged, the Defendants filed the complaint in the underlying mortgage foreclosure action on "June 26, 2014." (Id. at p. 3). As a result, even using June 26, 2014, [1] as the latest available date for statute of limitations purposes, Plaintiffs' FDCPA claims based on the filing of the underlying mortgage foreclosure action is barred by the FDCPA's one-year statute of limitations. [2]

1 The Court notes that the allegations of the amended complaint provide June 26, 2014, as the latest possible date upon which the Plaintiff can rely for purposes of the FDCPA's statute of limitations. See (Doc. 14, p. 4). However, in Udren's brief in support it identifies August 26, 2014, as the date upon which Plaintiffs were served with the complaint in the underlying mortgage foreclosure action. (Doc. 22, p. 8). In Ocwen and U.S. Bank's brief in support, those Defendants state that the Plaintiffs "were served with the Foreclosure Action around September 2014, given that they answered the complaint late in that month and did not assert any service of process objections." (Doc. 24, p. 7). Thus, even if the Court were to take a date "around September 2014," Plaintiffs' FDCPA claims based on the underlying mortgage foreclosure action would be time barred.

2 Plaintiffs also allege in their amended complaint that "Defendants violated § 1692f by engaging in unfair or unconscionable means to collect or attempt to collect a debt by the aforesaid conduct." (Doc. 14, p. 6). To the extent that Plaintiffs are claiming that Defendants alleged actions during the underlying mortgage foreclosure action can support a claim under section 1692f of the FDCPA, that claim is also time barred.

While Plaintiffs' FDCPA claims concerning the underlying state foreclosure action are barred by the one-year statute of limitations, Plaintiffs request that the Court find that Plaintiffs are entitled to equitable tolling of the FDCPA's statute of limitations. In particular, Plaintiffs argue that the statute of limitations for FDCPA claims which require the determination of the ultimate issue already before a state court, and thus are subject to federal abstention, be tolled during the pendency of that state court action. See (Doc. 27-1, pp. 4-9). In essence, Plaintiffs are asking the Court to carve out an exception to the FDCPA's statute of limitations based on an after the fact determination as to whether abstention would have applied had Plaintiffs filed a federal complaint alleging the FDCPA claims at issue during the pendency of the state court proceeding. See (Id.).

First, there is a question as to whether equitable tolling is available under the present circumstances. Specifically, "[e]quitable tolling is appropriate only when the statutory time limit is not jurisdictional." Shivone v. Washington Mut. Bank, F.A., 2008 U.S. Dist. LEXIS 59212, at *4 (E.D. Pa. Aug. 5, 2008). The "statute of limitations clause in the FDCPA falls under the heading, 'Jurisdiction,' and, consequently, there is split authority among the circuits regarding whether or not the limitations period is jurisdictional, meaning that it would not be subject to equitable tolling." Rotkiske v. Klemm, 2016 U.S. Dist. LEXIS 32908, at *14 (E.D. Pa. Mar. 15, 2016). Notably, "[t]he Court notes that the Third Circuit has not had the occasion to address the question whether the FDCPA's statute of limitations is jurisdictional." Coles v. Zucker Goldberg & Ackerman, 2015 U.S. Dist. LEXIS 98628, at *11 n.3 (D.N.J. July 29, 2015); but see Rotkiske, 2016 U.S. Dist. LEXIS 32908, at *14-15 (noting that "at least two Third Circuit Court of Appeals cases have considered equitable tolling arguments related to FDCPA claims.") (citing Kliesh v. Select Portfolio Serv., Inc., 527 Fed.Appx. 102, 104 (3d Cir. 2013); Glover v. F.D.I.C., 698 F.3d 139, 151 (3d Cir. 2012)). The Court need not decide, however, whether the FDCPA's statute of limitations is jurisdictional, and thus bars application of equitable tolling to FDCPA claims, because Plaintiffs have failed to establish circumstances necessary for the application of equitable tolling to their FDCPA claims concerning the underlying mortgage foreclosure action.

***8** "The doctrine of equitable tolling is only applicable when timely filing was prevented by extraordinary or sufficiently inequitable circumstances, and in that regard, equitable tolling should be sparingly applied by courts." Coles, 2015 U.S. Dist. LEXIS 98628, at *10 (citing Santos v. United States, 559 F.3d 189, 197 (3d Cir. 2009); Parker v. Pressler & Pressler, LLP, 650 F. Supp. 2d 326, 340 (D.N.J. 2009); Glover, 698 F.3d at 151; Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3d Cir. 1999)). "That said, a plaintiff may be entitled to equitable tolling if the conduct of the defendant prevented the plaintiff from ascertaining the viability of his or her claim within the limitations period." Id. (citing Kliesh, 419 Fed.Appx. at 271).

However, Plaintiffs' amended complaint does not support a determination that Plaintiffs were prevented from timely filing their FDCPA claim by an extraordinary or sufficiently inequitable circumstance. Further, the amended complaint shows that Plaintiffs were not prevented from ascertaining the viability of their FDCPA claim concerning the underlying mortgage foreclosure action within the limitations period by any fraud or concealment done by Defendants. Rather, quite the opposite. The basis of Plaintiffs' claims hinge on their allegation that:

> Plaintiffs never missed a single payment after relief was granted to defendant US Bank in the bankruptcy until defendant Ocwen began returning plaintiffs' payments in January 2014 despite Plaintiffs having copies of checks and bank statements evidencing payment for every month alleged unpaid. Furthermore, Defendants cashed the checks.

(Doc. 14, pp. 3-4). Notably, Plaintiffs continue by alleging that "[e]ven after the complaint in foreclosure was filed, and Plaintiffs continually informed Defendants of their mistake, Defendants pursued their meritless claim." (Id. at p. 4). These allegations run opposite to any argument that Defendants prevented Plaintiffs from ascertaining the viability of their FDCPA claim concerning the underlying mortgage foreclosure action within that Act's limitations period. Thus, even if the Court were to find that equitable tolling is allowed in FDCPA actions, Plaintiffs' request to apply equitable tolling to their FDCPA claims concerning their underlying mortgage foreclosure action is denied.

Furthermore, Plaintiffs' equitable tolling argument relies on the speculative conclusion that the Court would have found that this case was subject to federal abstention. Moreover, had Plaintiffs filed a complaint within the applicable statute of limitations, and during the pendency of the state court proceeding, the Court may have issued a stay, as opposed to dismissing the federal case. Also, adopting the mechanism proposed by Plaintiffs most likely would not avoid an abstention determination and, thus, conserve judicial resources. Rather, as would be the case here if Plaintiffs' argument was accepted, such a principle would just prolong that determination until the defendants move for relief under Federal Rule of Civil Procedure 12(b). Since the abstention determination most likely would be made regardless of when the federal complaint is filed, the Court does not find it necessary to prolong such a determination and, simultaneously, create a new equitable tolling exception to the FDCPA's statute of limitations.

Additionally, as noted, the accrual date for causes of action concerning prosecutions of underlying state court actions concerning a "debt" has been determined to be, at the latest, when the consumer is served with the complaint and summons in that action. See Schaffhauser, 340 Fed.Appx. at 130. If the Court were to adopt the equitable tolling exception proposed by Plaintiffs, the accrual date in most, if not all, cases where it is alleged that the defendant(s) violated the FDCPA by bringing and prosecuting an underlying action would become meaningless. Specifically, adopting this exception would, in effect, create a new accrual date for such actions, which would occur when the favorable verdict in the underlying case has been rendered.

***9** Based on these reasons, it is determined that Plaintiffs' request for this Court to apply an equitable tolling exception to the FDCPA's statute of limitations will be denied. Therefore, Plaintiffs' FDCPA claims based upon Plaintiffs' underlying mortgage foreclosure action are barred by the FDCPA's statute of limitations and, thus, will be dismissed. Additionally, since amendment of these claims would be futile, leave to amend will not be granted. As a result, Plaintiffs' FDCPA claims concerning the underlying mortgage foreclosure action will be dismissed with prejudice. Finally, as noted above, Plaintiffs' FDCPA claims based on the "Response" allegedly filed by Ocwen in the "bankruptcy," see (Doc. 14, p. 5), will be allowed to proceed.

B. State Law Claims

i. Wrongful Use of Civil Proceedings

Plaintiffs also claim that Defendants wrongfully used civil proceedings against them in violation of Pennsylvania's Dragonetti Act, 42 PA. CON. STAT. ANN. §§ 8351-8354. (Doc. 14, p. 6). As noted, Plaintiffs allege that "Defendants caused the underlying mortgage foreclosure litigation to be instituted against Plaintiffs." (Id.). Further, Defendants allegedly "commenced, continued and/or prosecuted underlying litigation ... against the Plaintiffs without probable cause." (Id.). According to Plaintiffs, the "underlying litigation was commenced and continued by Defendants and against Plaintiffs with malice and/or reckless indifference to the rights and interest of Plaintiffs." (Id.). Further, the underlying litigation "was terminated in Plaintiffs' favor, by way of the entry of an Order of the Court...." (Doc. 14, p. 6).

Udren argues that Plaintiff's Dragonetti claim "cannot be maintained when Plaintiffs failed to contest a final Bankruptcy Court Order, failed to properly assert their defenses in state court pleadings, and [fails] by their own pleaded admissions and filings." (Doc. 22, p. 8). Udren continues by arguing that "Plaintiffs cannot show, inter alia, that Udren acted in a grossly negligent manner or lacked probable cause because the mortgage default was established conclusively by the [Order on U.S. Bank's Motion for Relief from Automatic Stay], Confirmed Plan and their admissions." (Id. at p. 9). According to Udren, "[t]he [Order on U.S. Bank's Motion for Relief from Automatic Stay] and Confirmed Plan conclusively establish that the Plaintiffs failed to maintain both post-petition and pre-petition mortgage obligations." (Id.). Udren argues that "Plaintiffs are bound by these facts." (Id.).

Specifically, Udren contends that the Order on U.S. Bank's Motion for Relief from Automatic Stay "conclusively establishes the Plaintiff's post-petition mortgage default." (Id.). Udren states that 11 U.S.C. § 362(d) "authorizes the court to grant relief from the automatic stay, in the form of an order 'terminating, annulling, modifying or conditioning' the automatic stay, for 'cause.' " (Id.) (quoting 11 U.S.C. § 362(d)). Thus, according to Udren, section 362(d) requires the moving party to satisfy their initial burden to "demonstrate cause for relief." (Doc. 22, p. 10) (citing In re Ward, 837 F.2d 124, 128 (3d Cir. 1988)).

Additionally, Udren notes, "[a] bankruptcy court's order granting relief from the automatic stay constitutes a final order." (Id.) (citing In re Comer, 716, F.2d 168, 172 (3d Cir. 1983)). As a result, Udren concludes, "the Order granting relief to US Bank in the Bankruptcy Action is a final order." (Id.). Moreover, Udren notes that "Plaintiffs did not (1) oppose" U.S. Bank's motion for relief from automatic stay; "(2) respond to the CNR; (3) move to strike or reconsider the MFR Order; (4) timely appeal the MFR Order; or, (5) move to reinstate the automatic stay." (Id.) (citing Doc. 22-2). "Therefore," Udren concludes, "Plaintiffs are bound by the MFR

Order and Udren may rely on the MFR Order establishing a default necessitating a foreclosure action." (Id.).

***10** Udren also argues that "the Confirmed Plan to cure the default proposed by Plaintiffs in their bankruptcy and subsequently confirmed by Court Order is binding and conclusive upon Plaintiffs." (Id.) (emphasis in original). Udren contends that Plaintiffs are bound by the Confirmed Plan, "which provide[s] that Plaintiffs owed US Bank pre-petition arrears[footnote omitted] of $14,607.81." (Id.). Udren points out that "Plaintiffs admit in their Amended Complaint that they only paid '$12,600 in pre-petition arrears' through bankruptcy, leaving a deficiency of $2,007.81." (Doc. 22, pp. 10-11) (citing Doc. 22-1). Therefore, Udren concludes, "Plaintiffs ... admit they have not cured the pre-petition amounts through bankruptcy." (Id. at p. 11). As a result, Udren argues that since the "[p]re–and post-petition payment defaults are conclusively established through the record ... [it] cannot be held liable under Dragonetti for representing a lender that commence[d] a lawsuit against borrowers with an established default." (Id.) (citing Docs. 22-1, 22-3, 22-6).

Udren also claims that "judicial estoppel 'applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted.' " (Id.) (quoting Oneida Motor Freight Inc. v. United Jersey Bank, et al., 848 F.2d 414, 419 (3d Cir. 1988)). Here, Udren states that:

> Plaintiffs confusingly and unartfully state, "Plaintiffs never missed a single payment after relief was granted to defendant US Bank in the bankruptcy until defendant Ocwen began returning plaintiffs' payments in January 2014 despite [sic] Plaintiffs having copies of checks and bank statements evidencing payment for every month alleged unpaid."

(Id.) (citing Doc. 22-1).

Udren continues by contending that Plaintiffs' wrongful use of civil proceedings claim should be dismissed because even if the Court assumes "the absence of judicial admission of default by Plaintiffs in the bankruptcy proceeding, Plaintiffs' failure to effectively raise or plead defenses in the Foreclosure Action further buffers Udren from liability." (Doc. 22, p. 12). According to Udren, Plaintiffs did not plead any facts in the foreclosure action "which would have placed Udren on notice that Plaintiffs' claim of payment demanded investigation." (Id.). Udren argues that in Pennsylvania the defense of payment "must be pled in New Matter or waived." (Id.) (citing Pa.R.C.P. 1030(a), (b); Pa.R.C.P. 1033(a)). Udren claims that "Plaintiffs waived their claim of payment for failure to raise it as a defense in the foreclosure and cannot establish that Udren's primary purpose for which the proceedings were brought was not 'that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.' " (Id.).

Finally, Udren argues that "Plaintiffs prevailed at trial not because the Plaintiffs proved they were 'current' or the foreclosure was wrongful; rather, because US Bank failed to meet its burden of proof because business records were determined to be embedded with hearsay." (Id.). Merely prevailing at trial, according to Udren, "does not support a Dragonetti claim...." (Id.).

U.S. Bank and Ocwen likewise move to dismiss Plaintiffs' Dragonetti Act claim. (Doc. 24, pp. 8-11). According to U.S. Bank and Ocwen, Plaintiffs' "Dragonetti Act claim fails for two reasons: (1) defendants had probable cause to commence the Foreclosure Action; and (2) the [Plaintiffs] failed to allege that defendants commenced the Foreclosure Action for an improper purpose." (Doc. 24, p. 8).

In regards to their first point, U.S. Bank and Ocwen argue that "[t]he publicly-filed bankruptcy records demonstrate that Ocwen and U.S. Bank had probable cause to initiate the Foreclosure Action." (Id.). Specifically, "[t]he MFR Order and Confirmed Plan establish that the [Plaintiffs] failed to maintain both post-petition and pre-petition mortgage obligations." (Id. at p. 9). According to U.S. Bank and Ocwen, "[t]he MFR Order, in particular, establishes [Plaintiffs] post-petition mortgage default." (Id.). U.S. Bank and Ocwen state that "[t]he Bankruptcy Code authorizes the court to grant relief from the automatic stay, in the form of an order 'terminating, annulling, modifying or conditioning' the automatic stay, for 'cause.' " (Id.) (quoting 11 U.S.C. § 362(d)). "Under § 326(d)," U.S. Bank and Ocwen assert, "the party seeking relief from the stay has an initial burden to demonstrate cause for relief." (Id.) (citing In re Ward, 837 F.2d at 128). Additionally, U.S. Bank and Ocwen state that "[a] bankruptcy court's order granting relief from the automatic stay constitutes a final order." (Id.) (citing In re Comer, 716 F.2d at 172). U.S. Bank and Ocwen claim that Plaintiffs "did not oppose the MFR or challenge the

MFR Order once it was entered." (Doc. 24, p. 9). "Thus, Ocwen and U.S. Bank appropriately relied on the MFR Order to commence the Foreclosure Action." (Id.).

***11** In regard to the "Confirmed Plan," U.S. Bank and Ocwen argue that it "binds" Plaintiffs. (Id.). According to U.S. Bank and Ocwen, "[a] confirmed plan constitutes a new contract between the debtor and creditors." (Id.) (citing In re Pabilla, 379 B.R. 643, 663 (Bankr. S.D. Tex. 2007)). Moreover, U.S. Bank and Ocwen state that "[t]he confirmation order judicially validates the plan as the new 'contract' between the debtor and the creditors whose rights are addressed in the plan, with the plan either supplementing or superseding the prepetition legal relationship between the debtor and the creditors." (Id.) (citing In re McDonald, 336 B.R. 380, 383 (Bankr. N.D. Ill. 2006); In re Turek, 346 B.R. 350, 354-55 (Bankr. M.D. Pa. 2006); In re Miller, 325 B.R. 539, 543 (Bankr. W.D. Pa. 2005); In re Bryant, 323 B.R. 635, 639 (Bankr. E.D. Pa. 2005)). U.S. Bank and Ocwen continue by stating that "[s]ection 1327(a) of the Bankruptcy Code provides: 'The provisions of a confirmed plan bind the debtor and each creditor.' " (Id.). As a result, U.S. Bank and Ocwen conclude, Plaintiffs are "bound by the terms of the Confirmed Plan, which provides that they owed U.S. Bank and Ocwen pre-petition arrears of $14,607.81." (Id.). As U.S. Bank and Ocwen point out, Plaintiffs "admit in their Amended Complaint that they only paid '$12.600 in pre-petition arrears' through bankruptcy, leaving a deficiency of $2,007.81." (Doc. 24, pp. 9-10). Consequently, U.S. Bank and Ocwen conclude that "[t]he fact on which [they] based the foreclosure action were not merely 'reasonably believed' by them, those facts were established by the MFR Order and Confirmed Plan." (Id. at p. 10). Therefore, U.S. Bank and Ocwen argue that they had "probable cause to assert that the [Plaintiffs] had defaulted and to initiate foreclosure against them, and thus the Dragonetti Act claim must fail." (Id.).

Additioanlly, U.S. Bank and Ocwen seek dismissal of Plaintiff's Dragonetti claim because Plaintiffs failed to allege that the primary purpose for the foreclosure action was for a purpose other than adjudicating the foreclosure action. (Id.). Specifically, U.S. Bank and Ocwen argue that the Plaintiffs do "not allege any facts, or even legal conclusions, regarding the defendants' alleged primary purpose in bringing the Foreclosure Action." (Id.). While U.S. Bank and Ocwen acknowledge that Plaintiffs do allege that Defendants "did not properly investigate their claims before asserting them," they claim that Plaintiffs "do not state that [U.S. Bank and Ocwen] initiated the Foreclosure Action for an improper purpose." (Id.). According to U.S. Bank and Ocwen, "[t]he gist of the claim is that defendants were incorrect to assert [Plaintiffs] were in default, not that defendants initiated the Foreclosure Action for a purpose other than the relief sought on the face of their pleadings." (Doc. 24, p. 10).

Plaintiffs respond by arguing that "[n]o pleading filed or ruling entered in either Plaintiffs' Bankruptcy or the Foreclosure Action substantively bars Plaintiffs' Dragonetti claim...." (Doc. 27-1, p. 9). Initially, Plaintiff claims that since "none of [Defendants'] Exhibits A through J are attached by plaintiffs as Exhibits to their complaint" and the motions are brought under Federal Rule of Civil Procedure 12(b)(6), all of Defendants' "exhibits are procedurally defective and should be stricken." (Id. at p. 10). Additionally, according to Plaintiffs, "[n]otwithstanding the procedurally defective nature of the Exhibits, Movant's arguments based thereon are substantively unavailing." (Id.). In particular, Plaintiffs claim that the "Exhibits are irrelevant to a determination of Plaintiffs' Dragonetti claim premised on the continued prosecution of the foreclosure action without probable cause...." (Id.).

Plaintiffs then address the argument advanced by U.S. Bank and Ocwen that the bankruptcy filings, specifically the Confirmed Plan, bar the Dragonetti claim. (Id. at pp. 10-11). According to Plaintiffs, the "Plan is irrelevant to determining any post-petition default by plaintiffs to support probable cause to prosecute the 2014 foreclosure action by defendants three (3) years later." (Id. at p. 10).

Defendants, in their joint reply addressing Plaintiffs' Dragonetti claim, first contend that the exhibits they attached to their respective filings are properly before the Court because "a court may also consider public documents and prior judicial proceedings in evaluating a motion to dismiss" and Plaintiffs "expressly reference many of the documents attached to Defendants' motions in their amended complaint." (Doc. 28, p. 5). Defendants then argue that Plaintiffs' "miss the point" on the impact of the "MFR Order." (Id. at pp. 5-6). In particular, Defendants state that "not only did the MFR Order establish the [Plaintiffs'] default, but that it gave Defendants probable cause to file the Foreclosure

Action." (Id. at p. 6). "After all," Defendants continue, "the motion for relief from the automatic stay alleged that [Plaintiffs] had post-petition arrears, and [Plaintiffs], who were represented by counsel in the bankruptcy action, did not contest that point, and allowed the MFR Order to be entered." (Id.). "In short, when Defendants told the bankruptcy court that [Plaintiffs] were behind in their mortgage payments, [Plaintiffs] stayed silent, allowing the bankruptcy judge to enter a final order that expressly permitted the Foreclosure Action to be filed." (Id.). As a result, Defendants argue, Plaintiffs' Dragonetti claim should be barred because the foreclosure action was brought for a proper purpose. (Id.).

***12** Turning first to the exhibits attached to Defendants' respective briefs in support, it should be noted that "[t]o decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014). Said differently, the United States Court of Appeals for the Third Circuit has stated that "[i]n evaluating a motion to dismiss, we may consider documents that are attached to or submitted with the complaint, [Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002)], and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.' " Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006) (second alteration in original) (quoting 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, Federal Practice & Procedure § 1357 (3d ed. 2004)); see Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) ("[a] court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claim are based on the document."). "A document forms the basis of a claim if the document is 'integral to or explicitly relied upon in the complaint.' " Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)). Additionally, a court "may take judicial notice of the contents of another Court's docket." Orabi v. Attorney Gen. of the U.S., 738 F.3d 535, 537 n.1 (3d Cir. 2014). Moreover, "[t]aking judicial notice of the existence of other proceedings does not convert a motion to dismiss into a motion for summary judgment as long as the court does not take judicial notice of those proceedings to find facts." In re Able Labs. Sec. Litig., 2008 U.S. Dist. LEXIS 23538, at *62 n.21 (D.N.J. Mar. 24, 2008) (citing S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999); Global Network Comm. Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006)).

"The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint–lack of notice to the plaintiff–is dissipated 'where plaintiff has actual notice ... and has relied upon these documents in framing the complaint.' " In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1426 (quoting Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993); citing San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 808-09 (2d Cir. 1996)). "What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent." Id. (citing Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). Thus. "[w]hen a plaintiff relies on a document without attaching it to the complaint, the plaintiff nevertheless has notice that the document will be at issue." Hughes v. UPS, 639 Fed.Appx. 99, 103 (3d Cir. 2016) (non-binding precedent) (citing Schmidt, 770 F.3d at 249). "Indeed, failure to consider such documents would raise the countervailing concern that 'a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.' " Id. (quoting Pension Benefit, 998 F.2d at 1196).

Defendants have attempted to incorporate a number of documents into the motion to dismiss record which they contend are relevant to Plaintiffs' Dragonetti claim. See (Doc. 22); (Doc. 24). First, of those documents produced by Defendants for purposes of their respective motions to dismiss, Plaintiffs specifically cited to the following in their amended complaint: 1) U.S. Bank's motion for relief from stay filed on July 18, 2013, in the Plaintiffs' action in the United States Bankruptcy Court for the Middle District of Pennsylvania; 2) an August 8, 2013 order issued by the Bankruptcy Court; 3) Defendants' June 26, 2014 foreclosure complaint filed against Plaintiffs in the Court of Common Pleas of Wayne County, Pennsylvania; 4) the March 13, 2015 verdict rendered in the underlying mortgage foreclosure action; 5) Plaintiffs' discharge received in the bankruptcy action for their payment of $12,600 in pre-petition arrears to Ocwen; and 6) Ocwen's October 7, 2015 response filed in the bankruptcy action, which alleged that Plaintiffs' had a post-petition mortgage loan default from December 1, 2013 through October 1, 2015 in the total amount of $36,851.75. See (Doc. 14, pp. 3-4). Plaintiffs' discussion of these documents establishes that they were at the very least aware of their existence at the time they filed their amended complaint. Moreover, if this Court did not consider the aforementioned documents invoked by Plaintiffs' in their amended complaint such an action would "raise the concerns addressed in Pension Benefit[ ], 998 F2d at 1196." Hughes, 2016 U.S. App. LEXIS 1682, at *8. Finally, there is no dispute as to the authenticity of these documents Defendants are attempting to incorporate into the motion to dismiss record. See (Doc. 27-1, pp. 9-10).

***13** Additionally, the pertinent exhibits at issue were filed in judicial proceedings. See (Docs. 22-4, 22-6, 22-7, 24-3, 24-4, 24-5); In re Bainbridge, No. 10-9019 (Bankr. M.D. Pa. filed Nov. 4, 2010). As discussed above, "[t]o resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." S. Cross Overseas Agencies, 181 F.3d at 426 (citing City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); Pension Benefit, 998 F.2d at 1196; Iacaponi v. New Amsterdam Cas. Co., 379 F.2d 311, 311-12 (3d Cir. 1967); In re Woodmar Realty Co., 294 F.2d 785, 788 (7th Cir. 1961); DiNicola v. DiPaolo, 945 F. Supp. 848, 855 n.2 (W.D. Pa. 1996); Kithcart v. Metro. Life Ins. Co., 62 F. Supp. 93, 94 (W.D. Mo. 1944)). Notably, "if facts that are alleged to be true in a complaint are contradicted by facts that can be judicially noticed, the contradicted facts in the complaint are not to be deemed as true upon consideration of the motion to dismiss." Smith v. Litton Loan Servicing, LP, 2005 U.S. Dist. LEXIS 1815, at *18 (E.D. Pa. Feb. 4, 2005) (citing 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1364 (2004)).

Therefore, based on the foregoing, it is determined that the aforementioned exhibits attached to Defendants respective briefs in support will be considered in reaching a determination concerning the instant motions to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) challenging, inter alia, Plaintiffs' Dragonetti claims. Thus, with that in mind, the Court will now turn to the merits of the respective argument advanced by Defendants concerning Plaintiffs' Dragonetti claims.

"The Dragonetti Act codifies the common law tort of wrongful use of civil proceedings in Pennsylvania." Schmidt v. Currie, 217 Fed.Appx. 153, 155 (3d Cir. 2007) (citing 42 PA. CON. STAT. ANN. §§ 8351-8354). "Dragonetti Act claims may be brought against parties and the attorneys that represent them." Id. (citing 42 PA. CON. STAT. ANN. §§ 8351-8354). The United States Court of Appeals for the Third Circuit has stated that:

> A Dragonetti Act claim for wrongful use of civil proceedings has five elements, that: (1) the current plaintiff prevailed in the underlying actions; (2) the defendants acted in a grossly negligent manner or without probable cause; (3) the defendant had an improper purpose in pursuing the underlying action; (4) the proceedings terminated in favor of the plaintiff; and (5) the plaintiff was harmed.

The Bobrick Corp. v. Santana Prods., Inc., 422 Fed.Appx. 84, 86 (3d Cir. 2011) (citing 42 PA. CONS. STAT. ANN. §§ 8351(a), 8352; McNeil v. Jordan, 586 Pa. 413 (2006)); see Schmidt, 217 Fed.Appx. 153, 155 (3d Cir. 2007) ("To prevail on a Dragonetti Act claim, a plaintiff must prove that 'a person who [took] part in the procurement, initiation or continuation of civil proceedings against another.... (1) [acted] in a grossly negligent manner or without probable cause and primarily for [an improper] purpose ...; and (2) the proceedings ... terminated in favor of the person against whom they [were] brought.' ") (quoting 42 PA. CON. STAT. ANN. §§ 8351-8354). The Dragonetti Act defines "probable cause" as follows:

> A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonable believes in the existence of the facts upon which the claim is based, and either (1) reasonably believes that under those facts the claim may be valid under the existing or developing law;

> (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
> (3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

***14** 42 PA. CON. STAT. ANN. § 8352. "The existence of probable cause does not automatically defeat a Dragonetti Act claim" because gross negligence can also serve as a basis for liability in a Dragonetti Act claim. Peek v. Whittaker, 2014 U.S. Dist. LEXIS 70461, at *15-16 (W.D. Pa. May 22, 2014) (citing Buchleitner v. Perer, 794 A.2d 366, 377-78 (Pa. Super. Ct. 2002)). "In the context of a Dragonetti action, Pennsylvania courts have defined gross negligence to mean the 'want of scant care' or 'lack of slight diligence or care, or a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.' " Schmidt v. Currie, 470 F. Supp. 2d 477, 480 (E.D. Pa. 2005) (quoting Hart v. O'Malley, 781 A.2d 1211, 1218 (Pa. Super. Ct. 2001)).

The United States Court of Appeals for the Third Circuit has stated that "a party seeking redress under [the] Dragonetti [Act] bears a heavy burden." U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 394 (3d Cir. 2002). Specifically, the plaintiff bringing a Dragonetti Act claim bears such a burden "because the plaintiff need not only demonstrate either probable cause or gross negligence, but must also prove the underlying action was filed for an improper purpose." Currie, 217 Fed.Appx. at 155 (citing Broadwater v. Senter, 725 A.2d 779, 784 (Pa. Super. Ct. 1999)). However, "[a]n improper purpose may ... be inferred if the action is filed without probable cause." Peek, 2014 U.S. Dist. LEXIS 70461, at *22 n.8 (citing Logan v. Salem Baptist Church of Jenkintown, 2010 U.S. Dist. LEXIS 86916 (E.D. Pa. Aug. 24, 2010)); see Perelman v. Perelman, 125 A.3d 1259, 1264 (Pa. Super. 2015) (quoting Gentzler v. Atlee, 660 A.2d 1378, 1385 (1995)). Said differently, the Pennsylvania Superior Court has stated that "an improper purpose 'may be inferred where the action is filed without justification.' " Regent Ins. Co. v. Strausser Enters., 902 F. Supp. 2d 628, 640 n.34 (E.D. Pa. 2012) (quoting Broadwater, 725 A.2d at 784). "Thus, a claim for wrongful use of civil proceedings will lie 'if the trier of fact could reasonably conclude that the defendant initiated the underlying lawsuit without probable cause.' " Perelman, 125 A.3d at 1264 (quoting Gentzler, 660 A.2d at 1385).

Turning first to Defendants respective arguments concerning the impact of the Bankruptcy Court's grant of relief from automatic stay, it is determined that these contentions are without merit. Relief from the automatic stay in a bankruptcy action is governed by 11 U.S.C. § 362(d). Pursuant to section 362(d)(1), relief from the stay shall be granted "for cause, including the lack of adequate protection of an interest in property of such party in interest." In re Stone Res., Inc., 482 Fed.Appx. 719, 722 (3d Cir. 2012) (quoting 11 U.S.C. § 362(d)(1)). " 'Cause' is not a defined term in the Bankruptcy Code...." 1 BANKRUPTCY LAW MANUAL § 7:53 (5th ed.). "[B]ecause § 362(d)(1) does not define 'cause,' bankruptcy courts have the discretion to consider what constitutes cause based on the totality of the circumstances." In re Flintkote Co., 533 B.R. 887, 894 (D. Del. 2015) (citing In re Wilson, 116 F.3d 87, 90 (3d Cir. 1997)). Here, the Bankruptcy Court found sufficient "cause" to grant relief from the automatic stay because of the "failure of the Debtor to file an Answer or otherwise plead as directed by the Court...." (Doc. 22-6). As a result, even if the Order issued by the Bankruptcy Court had preclusive effect on the instant Dragonetti claim, the Order does not provide enough for this Court to say as a matter of law that the Order established "probable cause" to bring the underlying mortgage foreclosure action, much less to continue that action. Therefore, the Court will deny Defendants' respective motions to dismiss to the extent that they argue Plaintiffs' Dragonetti claim should be dismissed due to the Bankruptcy Court's order dated August 6, 2013.

***15** As for Defendants' respective arguments that Plaintiffs' Dragonetti claims should be dismissed because of the Confirmed Plan dated April 15, 2011, see (Doc. 22, pp. 10-11); (Doc. 24, pp. 9-10), those contentions also are without merit. As stated, Defendants argue that Plaintiffs' admission that they only paid $12,600.00 of the "$14,607.81" pre-petition arrears establishes a deficiency of approximately $2,000.00. (Id.). This deficiency, according to Defendants, shows that Plaintiffs admit that "they have not cured the pre-petition amounts through bankruptcy." (Doc. 22, p. 11); (Doc. 24, pp.

9-10). However, what the Defendants leave out of this argument is a mention of the Plaintiffs' allegation concerning the Bankruptcy Court's October 7, 2015 discharge of Plaintiffs' "chapter 13 bankruptcy." See (Doc. 14, p. 4). Specifically, as alleged by Plaintiffs in their amended complaint, on October 7, 2015, they "received a discharge of their chapter 13 bankruptcy wherein they had paid $12,600 in pre-petition arrears to Ocwen and its predecessor servicer, Litton." [3] (Id.). Moreover, Plaintiffs allege that they "never missed a single payment after relief was granted to defendant US Bank in the bankruptcy until defendant began returning plaintiffs' payments in January 2014 despite Plaintiffs having copies of checks and bank statements evidencing payments for every month alleged unpaid." (Id. at pp. 4-5). Thus, taking these allegations as true and construing all inferences in the light most favorable to the non-moving party, Plaintiffs' allegation that they paid "$12,600" in pre-petition arrears does not establish, as a matter of law, that Plaintiffs' have failed to state a Dragonetti claim upon which relief may be granted. Therefore, Defendants' respective arguments based upon the Confirmed Plan issued on April 15, 2011, will be denied.

3 "The discharge of a debt operates as an injunction against efforts to collect the discharged debt, and a discharge voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged." 8B C.J.S. BANKRUPTCY § 1075 (March 2017).

As noted, Udren also claims that Plaintiffs have failed to state claim under Dragonetti because judicial estoppel applies. See (Doc. 22, pp. 11-12). However, this claim also fails. "Judicial estoppel is a fact-specific, equitable doctrine, applied at courts' discretion." In re Kane, 628 F.3d 631, 638 (3d Cir. 2010). "It rests on the basic notion that, " 'absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." ' " Semper v. Gomez, 747 F.3d 229, 247 (3d Cir. 2014) (quoting In re Kane, 628 F.3d at 638).

Importantly, Udren has not identified two (2) contrary positions taken by Plaintiffs which would allow for the application of this equitable doctrine. See (Doc. 22, pp. 11-12). Further, " 'judicial estoppel is generally not appropriate where the defending party did not convince the [court] to accept its earlier position.' " Semper, 747 F.3d at 249 (alterations in original) (quoting G-Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 262 (3d Cir. 2009)); see also Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 781 (3d Cir. 2001). Udren has not established that Plaintiffs' were successful in advancing their contrary position. See (Doc. 22, pp. 11-12). Rather, as stated by Udren, "Plaintiffs prevailed at trial not because the Plaintiffs proved they were 'current' or the foreclosure was wrongful; rather, because US Bank failed to meet its burden of proof because business records were determined to be embedded with hearsay." (Id. at p. 12). As a result, that factor also supports the finding that Udren's judicial estoppel claim lacks merit.

Udren's claim that Plaintiffs failed to "effectively raise or plead defenses in the Foreclosure Action further buffers [it] from liability," (Id.), also does not establish that its entitled to dismissal of Plaintiffs' Dragonetti claim. According to Udren, "[t]here are no facts pleaded of record in the foreclosure which would have placed Udren on notice that Plaintiffs' claim of payment demanded investigation." (Id.). However, "[i]n an action for mortgage foreclosure, the entry of summary judgment is proper if the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount." Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa. Super. Ct. 1998) (citing Landau v. W. Pa. Nat'l Bank, 282 A.2d 335, 340 (1971)). Clearly, an element of the mortgage foreclosure action in Pennsylvania is the establishment that the defendant defaulted on the mortgage obligation. Cunningham, 714 A.2d at 1057. Thus, by brining the mortgage foreclosure suit, Defendants would have been on notice that an investigation into Plaintiffs' payments on the obligation in question would have been necessary to establish, in part, Defendants' entitlement to judgment on that claim. As a result, the Court rejects Udren's contention that Plaintiffs' failure to "effectively raise or plead defenses in the Foreclosure Action further buffers [it] from liability" because Plaintiffs' payment on, or lack thereof, the mortgage obligation was a central factual question in the underlying foreclosure action. See (Doc. 22, p. 12). Such a conclusion is supported by the Court of Common Pleas entering judgment in favor of Plaintiffs because their default was not established by the evidence presented at trial. (Doc. 24-7). As a result, Udren's motion to dismiss on this ground will be denied.

***16** As for Defendants U.S. Bank and Ocwen's claim that Plaintiffs have failed to allege that Ocwen or U.S. Bank filed the underlying mortgage foreclosure action for an improper purpose, that claims is also without merit. (Id. at pp. 10-11). "An improper purpose is 'a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based.' " Montgomery v. Midland Credit Mgmt., 2014 U.S. Dist. LEXIS 100327, at *22 (E.D. Pa. June 19, 2014) (quoting 42 Pa. C.S.A. § 8351(a)(1)). However, "a claim for wrongful use of civil proceedings will lie 'if the trier of fact could reasonably conclude that the defendant initiated the underlying lawsuit without probable cause.' " Perelman, 125 A.3d at 1264 (quoting Gentzler, 660 A.2d at 1385). Here, Plaintiffs allege that "[e]ven after the complaint in foreclosure was filed, and Plaintiffs continually informed Defendants of their mistake, Defendants pursued their meritless claim." (Doc. 14, p. 4). They also claim that Defendants "initiated the foreclosure litigation against Plaintiffs without investigating the claimed default whatsoever." (Id.). Further, Plaintiffs allege that they "never missed a single payment after relief was granted to defendant US Bank in the bankruptcy until defendant began returning plaintiffs' payments in January 2014 despite Plaintiffs having copies of checks and bank statements evidencing payments for every month alleged unpaid." (Id. at pp. 4-5). Taking these allegations as true and every inference in favor of the Plaintiffs, it is at least plausible that Plaintiffs can show, after discovery, that Defendants Ocwen and U.S. Bank filed the underlying mortgage foreclosure action without justification and, thus, for an improper purpose. 42 Pa. C.S. § 8354(4); see Perelman, 125 A.3d at 1264 (quoting Gentzler, 660 A.2d at 1385); Regent Ins. Co., 902 F. Supp. 2d at 640 n.34 (quoting Broadwater, 725 A.2d at 784); Ciolli v. Iravani, 625 F. Supp. 2d 276, 295 (E.D. Pa. 2009) (Noting that an improper purpose can be inferred where an action is filed without justification and "whether an alleged purpose is improper is an issue for the jury to decide.") (quoting Broadwater, 725 A.2d at 784; citing Bannar v. Miller, 701 A.2d 242, 249 (Pa. Super. Ct. 1997)); Gigli v. Palisades Collection, L.L.C., 2008 U.S. Dist. LEXIS 62684, at *46-47 (M.D. Pa. Aug. 14, 2008) (Vanaskie, J.) (citing Buchleitner v. Perer, 794 A.2d 366, 377 (Pa. Super. Ct. 2002)); but see Bobrick Corp. v. Santana Prods., Inc., 698 F. Supp. 2d 479, 492 (M.D. Pa. 2010) (Vanaskie, J.) ("The court decides the existence of probable cause ... or improper purpose as a matter of law when the facts are not in dispute.") (citing Schmidt, 217 Fed.Appx. at 155). Consequently, U.S. Bank and Ocwen's motion to dismiss on this ground will be denied.

Based on the foregoing, Plaintiffs' Dragonetti claim has survived all challenges raised by Defendants. Therefore, those portions of Defendants' respective motions seeking dismissal of Plaintiffs' Dragonetti claim will be denied.

ii. UTPCPL Claim

Plaintiffs also allege that Defendants violated the UTPCPL. (Doc. 14, pp. 6-8). According to Plaintiffs:

> US Bank, through authorized agents and employees but not limited to co-defendant Ocwen, and Ocwen, through authorized agents and employees including but not limited to co-defendant Udren failed to state material facts or otherwise misstated, misrepresented, or omitted the true facts concerning or related to the status of the Loan that tended to deceive and/or did in fact deceive plaintiffs....

(Doc. 14, p. 7). Plaintiffs claim that Defendants' unfair or deceptive acts include, but are not limited to, the following:

> (a) Represented that an accurate accounting of plaintiffs' loan had been made and reviewed thereafter in the course of the foreclosure; (b) By the filing of the underlying action represented that plaintiffs were in default under the terms of the Note and Mortgage; (c) By the filing of the underlying litigation represented that defendants were entitled to foreclose and sell plaintiffs' home at sheriff's sale without first properly accounting for plaintiffs' payments under the loan; (d) By the filing of the underlying litigation represented that the underlying foreclosure was lawful.

(Id.). Plaintiffs allege that "[i]t is unreasonable to conclude that a national bank like US Bank and a national mortgage servicer like Ocwen does not intend for its customers to rely upon its communications about their account–especially when," according to Plaintiffs, "the communications involve seeking to sell plaintiffs' home as in the underlying action and the defendants collectively fail to acknowledge or review their errors and instead simply ratify their continued wrongful conduct as in this matter." (Id.). Plaintiffs claim that they "reasonably relied upon the material acts and actions of defendants as exemplified by their retaining counsel to defendant the underlying litigation." (Doc. 14, p. 7). Plaintiffs state that:

> [b]ut for defendants and their respective agents' and employees' acts and omissions and disregard for its won records reflecting default by plaintiffs when plaintiffs' regular payments were cashed by Ocwen for nearly a year after a date of default alleged in the underlying litigation resulting in conflicting and otherwise incorrect accounting of plaintiffs' loan, plaintiffs would not have sustained any damages and losses.

***17** (Id. at p. 8).

Based on the foregoing, Plaintiffs claim that Defendants violated section 201-3 of the UTPCPL. (Id.). Specifically, Plaintiffs allege that Defendants violated section 201-3 when they "engaged in fraudulent or deceptive conduct which created a likelihood of confusion or of misunderstanding as to a default under the terms of the Note and mortgage entitling defendants to file the foreclosure." (Id.) (citing 73 P.S. § 201-2(4)(xxi)). Also, Plaintiffs allege that Defendants violated section 201-3 of the UTPCPL when they:

> misrepresented the characteristics or benefits of the loan accounting of the loan rendered to plaintiffs as being inaccurate when the loan's servicing and accounting was defective resulting in false allegations of default and false legal claims of right to sell plaintiffs' home under the terms of the Note and Mortgage.

(Doc. 14, p. 8) (citing 73 P.S. § 201-2(4)(v)).

The UTPCPL is "a remedial statute intended to protect consumers from unfair or deceptive [business] practices or acts...." Balderston v. Medtronic Sofamor Danek, Inc., 152 F. Supp. 2d 772, 776 (E.D. Pa. 2001). The UTPCPL "prohibits '[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,' as defined by other provisions of the statute." Mondron v. State Farm Mut. Auto. Ins. Co., 2016 U.S. Dist. LEXIS 176404, at *10 (W.D. Pa. Dec. 21, 2016) (alteration in original) (quoting 73 P.S. §§ 201-3 and 201-2(4)). Notably:

> the UTPCPL provides a private cause of action to "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful."

Id. at *10-11 (quoting 73 P.S. § 201-9.2(a)). "To maintain a private right of action under the UTPCPL, a plaintiff must demonstrate (1) 'ascertainable loss of money or property, real or personal,' [73 P.S.] § 201-9.2(a), (2) 'as a result of' the defendant's prohibited conduct under the statute." Laymark v. Bank of Am., N.A., 783 F.3d 168, 180 (3d Cir. 2015) (quoting 73 P.S. § 201-9.2(a); citing Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 438 (Pa. 2004)). Furthermore, a plaintiff bringing a claim under the UTPCPL " ' must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance....' " Hunt v. U.S. Tobacco Co., 538 F.3d 217, 224 (3d Cir. 2008) (first alteration in original) (quoting Yocca, 854 A.2d at 438); see Tran v. Metro. Life Ins. Co., 408 F.3d 130, 140 (3d Cir. 2005); see also Mohney v. Forney, 93 Fed.Appx. 391, 395 (3d Cir. 2004); Post v. Liberty Mut. Grp., Inc., 2014 U.S. Dist. LEXIS 83373, at *7-8 (E.D. Pa. June 18, 2014) (quoting Seldon v. Home Loan Servs., Inc., 647 F. Supp. 2d 451, 466 (E.D. Pa. 2009); citing Toy v. Metro. Life Ins. Co., 863 A.2d 1, 11 (Pa. Super. Ct. 2004), aff'd, 928 A.2d 186 (Pa. 2007)); Grudkowski v. Foremost Ins. Co., 2013 U.S. Dist. LEXIS 30567, at *26-31 (M.D. Pa. Mar. 5, 2013) (Caputo, J.).

***18** Defendants move to dismiss Plaintiffs' UTPCPL claims.[4] See (Docs. 21, 23). In particular, Udren argues that Plaintiffs have failed to plead an ascertainable loss of money or property, real or personal, and justifiable reliance, both of which are required to successfully prosecute a UTPCPL action. (Doc. 22, p. 13). As for justifiable reliance, Udren argues that:

> Plaintiffs do no assert one iota of a fact supporting justifiable reliance or specific harm therefrom, rather, they baldly claim that they were "unable to buy a new truck," they "have been forced to rent rather than purchase a new home because they cannot qualify for an affordable mortgage" their credit was damaged and they hired an attorney to defend the foreclosure action.

(Doc. 22, p. 14). Udren claims that "[t]here is absolutely no nexus between any alleged representation of Udren and the alleged (and unascertainable) harm by Plaintiffs." (Id.). Therefore, Udren concludes, "Plaintiffs' claims for purported violations of the UTPCPL ... should be dismissed." (Id.).

4 Udren also argues that Plaintiffs' claim pursuant to the Fair Credit Extension Uniformity Act ("FCEUA"), 73 PA. CON. STAT. ANN. § 2270.1 etseq., should be dismissed because it is expressly excluded from liability under the FCEUA. (Doc. 22, p. 13). Notably, however, Plaintiffs have withdrawn their FCEUA claim. See (Doc. 14, pp. 6-8); (Doc. 27-1, p. 13). Consequently, to the extent that Udren moves for dismissal of Plaintiffs' withdrawn FCEUA claim, it will be dismissed as moot.

Finally, Udren argues that "the economic loss doctrine precludes Plaintiffs' right to recovery under the UTPCPL, and, therefore, the FCEUA." (Id.). According to Udren, "[h]ere, the determination of whether Udren violated the UTPCPL turns on whether Plaintiffs, as they allege, were current under the terms of the Note and Mortgage." (Id. at p. 15). "Since any claims based on alleged misrepresentations are necessarily interwoven with the mortgage and note themselves," Udren concludes, "Plaintiff[s'] UTPCPL claim is barred by the economic loss doctrine." (Id.).

U.S. Bank and Ocwen argue that there are two (2) reasons why Plaintiffs' UTPCPL claim should be dismissed. (Doc. 24, pp. 11-14). Specifically, U.S. Bank and Ocwen assert that Plaintiffs' UTPCPL claim is barred by the economic loss doctrine and judicial privilege. (Doc. 24, pp. 11-14).

Turning first to U.S. Bank and Ocwen's argument concerning the economic loss doctrine, they claim that "the determination of whether Ocwen and U.S. Bank violated the UTPCPL turns on whether [Plaintiffs], as they allege, were current under the terms of the mortgage loan, i.e., the parties' written agreement." (Id. at p. 12). According to U.S. Bank and Ocwen, "all of the factual allegations contained within Count III relate to the servicing of [Plaintiffs'] mortgage loan and whether their payment were appropriately accounted for under the terms of the parties' loan agreement." (Id.). U.S. Bank and Ocwen conclude that "[b]ecause any claims based on defendants' alleged misrepresentations regarding the mortgage loan's accounting are necessarily interwoven with the mortgage loan, the UTPCPL claim is barred by the economic loss doctrine. [footnote omitted]" (Id. at p. 13). Additionally, U.S. Bank and Ocwen argue that Plaintiffs' "claim of emotional distress" fails to "salvage their UTPCPL claim because such alleged damages are not compensable under the UTPCPL." (Id. at p. 13 n.4).

***19** U.S. Bank and Ocwen then argue that Plaintiffs' UTPCPL claim is also barred by judicial privilege. (Id. at p. 13). According to U.S. Bank and Ocwen, "[t]his case is no different" than Schwartz v. OneWest Bank, FSB, 614 Fed.Appx. 80, 81-82 (3d Cir. 2015) (non-precedential), which, these Defendants contend, resulted in the Third Circuit finding that the "UTPCPL claim, among others, was barred by Pennsylvania's judicial privilege doctrine." (Doc. 24, p. 14). U.S. Bank and Ocwen claim that "[a]ll of the factual allegations relating to the UTPCPL describe statements made by defendants in the Foreclosure Action." (Id.). In particular, Plaintiffs:

> allege that Ocwen and U.S. Bank violated the UTPCPL by "[r]epresent[ing] that an accurate account of plaintiffs' loan had been made and reviewed thereafter in the course of the foreclosure" and "[b]y the filing of underlying action represented that plaintiffs were in default [and] that defendants were entitled to foreclose [and] that the underlying foreclosure was lawful."

(Id.) (emphasis and alteration in original). "As such," these U.S. Bank and Ocwen conclude, "the allegations that underpin the UTPCPL claim are the statements and claims made by Ocwen and/or U.S. Bank in the course of the underlying foreclosure litigation, whether in pleadings, other court submissions, or out-of-court discussions regarding this matter." (Id.). Therefore, U.S.

Bank and Ocwen conclude, "[a]s the Third Circuit held in Schwartz, such statements are absolutely privileged under Pennsylvania law, and the UTPCPL claim must fail for this reason." (Id.).

Plaintiffs respond by first addressing Udren's argument based on justifiable reliance. (Doc. 27-1, p. 14). According to Plaintiffs, they "justifiably relied on [Udren's] misrepresentations of a default in the Foreclosure Action because they hired counsel to oppose it." (Id.). Plaintiffs continue by asserting that they "were forced to depend upon the Foreclosure Action complaint's misrepresentation of default by paying defense counsel to file an answer in defense to prevent a default judgment that would result in loss of their home." (Id.). Plaintiffs claim that "such reliance was forced rather than seduced by Ocwen does not make it any less reliance or any less justified." (Id.). Further, Plaintiffs argue that they "otherwise clearly allege damages from such misrepresentations being the legal fees and costs paid to defend the Foreclosure Action, emotional and credit damage from therefrom." (Id.).

Plaintiffs then address Udren's argument that they have failed to sufficiently plead ascertainable loss. (Id.). In particular, Plaintiffs claim that Grimes, a case cited by Udren, is distinguishable from the present circumstances. (Id. at pp. 14-15). In particular, Plaintiffs argue that Grimes is inapplicable because, unlike Grimes, which rejected a plaintiff's claim that legal fees incurred bringing a UTPCPL claim satisfies the ascertainable loss requirement, Plaintiffs are claiming the legal fees incurred from the underlying foreclosure action as damages. (Id.). Plaintiffs state that "[u]nlike Grimes, however, no facts in the instant case support plaintiffs were spinning novel legal theories to manufacture a default of their mortgage loan to provoke a foreclosure showdown with Ocwen as a pretext to file the instant litigation." (Doc. 27-1, pp. 14-15). "Accordingly," Plaintiffs argue, "the holding of Grimes should be restricted to facts where a UTPCPL consumer has some meaningful choice as to manufacture of their litigation costs in an underlying action rather than the UTPCPL defendant in an underlying action manufacturing those costs by its actions leaving the consumer no choice but to incur legal costs to combat a wrong." (Id. at p. 15). Moreover, "[t]his formulation is otherwise consistent with the statutory language of the UTPCPL which explicitly provides that any person who suffers an ascertainable loss 'may bring a private action to recover actual damages.' " (Id.).

***20** In regards to the argument that their UTPCPL claims are barred by the United States Court of Appeals' decision in Werwinski v. Ford Motor Co., 286 F.3d 661, 671 (3d Cir. 2002), and the economic loss doctrine, Plaintiffs claim that Defendants' reliance "upon Werwinski is misplaced insofar as the Third Circuit Court of Appeals' projection of the Pennsylvania Supreme Court's decision on gist of the action/economic loss doctrine is no longer controlling given that" the Supreme Court of Pennsylvania has "issued a ruling on application of this doctrine which permits tort claims for fraudulent contract performance." (Doc. 27-1, p. 16) (citing Bruno v. Erie Ins. Co., 106 A.3d 48 (Pa. 2014)).

"In Bruno," Plaintiffs state, "homeowner insureds sued their insurer, Erie Insurance Company, for negligently performing under the applicable homeowners' insurance policy covering mold remediation expenses." (Doc. 27-1, p. 16). "Erie had informed the plaintiffs that the suspected mold was harmless, causing plaintiffs to continue residing in the home during renovations until the mold later proved toxic, causing plaintiffs significant respiratory illness including throat cancer." (Id.). According to Plaintiffs, "[t]he relevant issue on appeal was whether the Brunos' negligence claim, based on Erie's representation that the mold was harmless, was barred by the gist of the action doctrine." (Id.). Plaintiff continues by noting that the Supreme Court of Pennsylvania "conceded that Erie was under a contractual obligation to investigate the alleged mold...." (Id.). However, the Supreme Court of Pennsylvania:

> held that the gist of the action doctrine did not apply because Erie acted negligently in fulfilling its contractual obligations, and this negligence "concerns Erie's alleged breach of a general social duty, not a breach of any duty created by the insurance policy itself."

(Id. at pp. 16-17). Plaintiffs contend that "[t]his represents a break with the [Pennsylvania] Superior Court's holding in eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10 (Pa. Super. 2002) which rejected eToll's argument that 'the duty to refrain from deliberate deceit is a duty implied by law, not derived from a private contract.' " (Doc. 27-1, p. 17). Plaintiffs claim that:

> Bruno recognizes that, while a contract establishes a relationship between parties, it does not provide an exhaustive basis for the source of duties owed by the parties, and that a contractual relationship does not necessarily preclude the existence of extra-contractual duties that may be imposed by common law or statute.

(Id.).

Turning to this matter, Plaintiffs contend that the economic loss doctrine should not apply here because "Ocwen, and Udren, in its capacity as the agent of Ocwen had a duty to avoid unfair and deceptive practices in the latter's performance of services under the mortgage contract with plaintiffs." (Id.). As to the impact of judicial privilege on the viability of their UTPCPL claim, Plaintiffs argue that the Court should not follow the United States Court of Appeals for the Third Circuit's decision in Schwartz. (Id. at pp. 17-18). The Court will address the issues of justifiable reliance and judicial privilege in turn. [5]

5 As discussed in more detail below, since justifiable reliance and judicial privilege are dispositive, the Court will not render a decision on the Defendants' respective arguments concerning the application of the economic loss doctrine to this case or Udren's argument that Plaintiffs failed to sufficiently plead ascertainable loss.

a. Justifiable Reliance

***21** As stated, Udren notes that "[i]n order to proceed under the UTPCPL's private right of action, a plaintiff must plead that he or she 'suffer[ed]' and 'ascertainable loss of money or property, real or personal,' " (Doc. 22, p. 13) (quoting 73 P.S. § 201-9.2(a)). Additionally, Udren also correctly notes that for Plaintiffs to defeat the instant motion to dismiss as to their UTPCPL claims they must sufficiently plead "justifiable reliance under the statute to satisfy this stringent causation requirement." (Id.) (citing Yocca, 854 A.2d at 438); see Hunt, 538 F.3d at 221; Glover v. Wells Fargo Home Mortg., 629 Fed.Appx. 331, 344 (3d Cir. 2015) (" 'To bring a private cause of action under the UTPCPL, a plaintiff must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance.' ") (quoting Yocca, 854 A.2d at 438). Udren argues that Plaintiffs' UTPCPL claims should be dismissed because, inter alia, they failed to plead ascertainable loss and justifiable reliance. (Id. at pp. 13-14). According to Udren, "[j]ustifiable reliance is conspicuously absent from the Complaint." (Id.). Udren continues by stating that:

> Plaintiffs do not assert one iota of a fact supporting justifiable reliance or specific harm therefrom, rather, they baldly claim that they were "unable to buy a new truck," they "have been forced to rent rather than purchase a new home because they cannot qualify for an affordable mortgage" their credit was damaged and they hired an attorney to defend the foreclosure action.

(Doc. 22, pp. 13-14). According to Udren, "[t]here is absolutely no nexus between any alleged representation of Udren and the alleged (and unascertainable) harm by Plaintiffs." (Id.). As a result, Udren argues, Plaintiffs' UTPCPL claims should be dismissed.

A review of the amended complaint reveals that Plaintiffs have failed to sufficiently plead that they justifiably relied on a miscommunication or deceptive communication to their detriment. Rather, the basis of Plaintiffs' UTPCPL claim hinges on the fact that they did not rely on the alleged misrepresentations of Udren. Rather, according to Plaintiff, they "reasonably relied upon the material acts and actions of defendants as exemplified by their retaining counsel to defend the underlying litigation." (Doc. 14, p. 7). Plaintiffs further allege that:

> But for defendants and their respective agents' and employees' acts and omissions and disregard for its own records reflecting default by plaintiffs when plaintiffs' regular payments were cashed by Ocwen for nearly a year after a date of default alleged in the underlying litigation resulting in conflicting and otherwise incorrect accounting of plaintiffs' loan, plaintiffs would not have sustained any damages and losses.

(Id. at p. 8). As these allegations show, Plaintiffs do not allege that they ever thought the communications relevant to their UTPCPL claims were accurate. Instead, as stated, this matter is centered on Plaintiffs' alleged unwillingness to believe the allegations advanced by the Defendants in the underlying mortgage foreclosure case.

See Warren v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 21253, at *9-10 (W.D. Pa. Feb. 22, 2016); Williams v. EMC Mortg. Corp., 2013 U.S. Dist. LEXIS 63426, at *17 (E.D. Pa. May 3, 2013) ("The plaintiff claims he kept trying to make his regular mortgage payments even after the alleged misrepresentations so it appears he did not rely on the alleged misrepresentations in a way that altered his behavior."). Importantly, " '[w]hether reliance on an alleged misrepresentation is justified depends on whether the recipient knew or should have known that the information supplied was false.' " Davis v. Bank of Am., N.A., 2016 U.S. Dist. LEXIS 13333, at *13-14 (E.D. Pa. Feb. 3, 2016) (alteration in original) (quoting Porreco v. Porreco, 571 Pa. 61, 811 A.2d 566 (Pa. 2002)). "A plaintiff 'is not justified in relying upon the truth of an allegedly fraudulent misrepresentation if he knows it to be false or if its falsity is obvious.' " Davis, 2016 U.S. Dist. LEXIS 13333, at *14 (quoting Toy v. Metro Life Ins. Co., 928 A.2d 186, 201 (Pa. 2007)).

***22** Here, Plaintiffs allege that "[e]ven after the complaint in foreclosure was filed, and Plaintiffs continually informed Defendants of their mistake, Defendants pursued their meritless claim." (Doc. 14, p. 4). This theory is continued by Plaintiffs in their brief in opposition to the motions to dismiss at bar. According to Plaintiffs, "[t]hey did not rely upon the truth of the Foreclosure Action's misrepresentations as one dictionary definition of 'rely' would permit, i.e. to 'place confidence in' and act accordingly." (Doc. 27-1, p. 14). Thus, based upon the facts alleged in their amended complaint, Plaintiffs have failed to sufficiently allege that they justifiably relied on the communications relevant to their UTPCPL claims. As a result, Plaintiffs' UTPCPL claims against Udren will be dismissed.

Clearly, based upon the facts alleged in the amended complaint, no set of facts can be alleged under these circumstances which would allow Plaintiffs to obtain relief against Udren under the UTPCPL. Specifically, Plaintiffs will be unable to sufficiently plead that they justifiably relied on the communications relevant to their UTPCPL claims against Udren to establish that they are entitled to relief for those claims. As a result, amendment will not be allowed as to these claims because any such amendment would be futile. Therefore, Plaintiffs' UTPCPL claims against Udren will be dismissed with prejudice.

b. Judicial Privilege

To the extent that U.S. Bank and Ocwen argue that Plaintiffs' UTPCPL claims should be dismissed because they are barred by Pennsylvania's judicial privilege doctrine, (Doc. 24, pp. 2, 13-14), their motion will be granted. As stated, U.S. Bank and Ocwen argue that "[t]his case is no different" than Schwartz v. OneWest Bank, FSB, 614 Fed.Appx. 80, 81-82 (3d Cir. 2015) (non-precedential), which resulted in the Third Circuit finding that the "UTPCPL claim, among others, was barred by Pennsylvania's judicial privilege doctrine." (Doc. 24, p. 14). U.S. Bank and Ocwen claim that "[a]ll of the factual allegations relating to the UTPCPL describe statements made by defendants in the Foreclosure Action." (Id.). In particular, Plaintiffs "allege that Ocwen and U.S. Bank violated the UTPCPL by '[r]epresent[ing] that an accurate account of plaintiffs' loan had been made and reviewed thereafter in the course of the foreclosure' and '[b]y the filing of underlying action represented that plaintiffs were in default [and] that defendants were entitled to foreclose [and] that the underlying foreclosure was lawful.' " (Id.) (emphasis and alteration in original). "As such," U.S. Bank and Ocwen conclude, "the allegations that underpin the UTPCPL claim are the statements and claims made by Ocwen and/or U.S. Bank in the course of the underlying foreclosure litigation, whether in pleadings, other court submissions, or out-of-court discussions regarding this matter." (Id.).

In response, Plaintiffs claim that "[t]he jurisprudence of the Third Circuit in Schwartz is clearly unsound and should not be followed." (Doc. 27-1, p. 17). According to Plaintiffs, "[l]itigation privilege, a doctrine based in common law, does not overcome statutory directives of the legislature." (Doc. 27-1, p. 17). "Hence," Plaintiffs continue, "1 Pa. Code § 1504 holds that a statutory remedy is always preferred over common law...." [6] (Id.). Plaintiffs contend that "[t]he Third Circuit in Schwartz based its holding barring UTPCPL claims upon four (4) case decisions involving a litigation privilege bar to only common law claims." (Id.). Specifically, Plaintiffs state that "General Refractories Company involved claims of Abuse of Process, for which the appeals court reversed and remanded for amendment of the complaint, and barred the common law conspiracy claim." (Id. at pp. 17-18). Plaintiffs continue by stating that the Pennsylvania Superior Court "cases of Binder v. Triangle Publ'ns, Inc.

and Richmond v. McHale, involved common law claims of defamation that were barred by the privilege." (Id. at p. 18). "After discussing these cases," Plaintiffs contend, the Third Circuit in Schwartz went "on to make this erroneous broad brush conclusion of law to bring non-defamation claims under the litigation privilege." (Id.).

6 As quoted by Plaintiffs, section 1504 states:

> In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect.

1 PA. CONS. STAT. ANN. § 1504; (Doc. 27-1, p. 17).

***23** Plaintiffs also take issue with the Third Circuit's reliance on Moses v. McWilliams, 549 A.2d 950 (1988). (Doc. 27-1, p. 18). On this point, Plaintiffs quote the Schwartz decision for the following:

> Although the judicial privilege most often bars defamation suits, Pennsylvania courts have applied the privilege broadly to confer "immunity from civil liability in the context of judicial proceedings."

(Id.). "However," Plaintiffs argue, "the Moses Court was holding nothing of this kind. Indeed, while the Moses holding did apply judicial immunity to constrain a statutory right[footnote omitted], it did so in the factual/legal context of a defamation claim." (Id.) (citing Moses, 549 A.2d 950).

In Schwartz, a plaintiff "brought Pennsylvania state law claims against" the defendant, which included, inter alia, a claim under the UTPCPL. Schwartz, 614 Fed.Appx. at 81. The plaintiff's UTPCPL claim in Schwartz was "based on statements [the defendant] made in connection with foreclosure proceedings on [the plaintiff's] property." Id. "The District Court dismissed [the plaintiff's] claims, holding that [the defendant's] statements were protected by Pennsylvania's absolute judicial privilege and that [the plaintiff's] abuse of process claim was inadequately pled." Id. The Third Circuit noted that:

> all of [the plaintiff's] claims arise from the foreclosure action and communications that occurred in connection with that action, namely the foreclosure complaint, the related sale notices posted as a result of the state court judgment in the foreclosure action, see PA. R. CIV. P. 3129.1, and communications between [the defendant's] and [the plaintiff's] attorneys that directly pertained to the foreclosure action.

Schwartz, 614 Fed.Appx. at 83. In addressing the District Court's "dismissal of all claims but the abuse of process claim on the ground that they depended on communications protected by Pennsylvania's judicial privilege," the Third Circuit found that "[t]hese communications reflected counsel's efforts to share their clients' litigation positions regarding [the defendant's] assertion that the mortgage covered both parcels, and thus were 'pertinent and material to the redress or relief sought' in the foreclosure case." Id. at 81 (quoting Post v. Mendel, 507 A.2d 351, 355 (Pa. 1986); citing Richmond v. McHale, 35 A.3d 779, 784, 786 (Pa. Super. Ct. 2012)). "Thus," the Third Circuit determined, "we will affirm the District Court's dismissal of all claims, other than the abuse of process claim, on the ground that the allegedly improper communications that form the basis for these claims are protected by the judicial privilege.[footnote omitted]" Id.

Here, Plaintiff alleges that the UTPCPL was violated when Defendants:

> failed to state material facts or otherwise misstated, misrepresented, or omitted the true facts concerning or related to the status of the Loan that tended to deceive and/or did in fact deceive plaintiffs as described herein including but not limited to: (a) Represented that an accurate accounting of plaintiffs' loan had been made and reviewed thereafter in the course of the foreclosure; (b) By the filing of the underlying action represented that plaintiffs were in default under the terms of the Note and Mortgage; (c) By the filing of the underlying litigation represented that defendants were entitled to foreclose and sell plaintiffs' home at sheriff's sale without first properly

> accounting for plaintiffs' payments under the loan; (d) By the filing of the underlying litigation represented that the underlying foreclosure was lawful.

***24** (Doc. 14, p. 7). Plaintiffs continue by claiming that "[i]t is not unreasonable to conclude that a national bank like US Bank and a national mortgage servicer like Ocwen does not intend for its customers to rely upon its communications about their account...." (Id.). "[E]specially," Plaintiffs continue, "when the communications involve seeking to sell plaintiffs' home as in the underlying action and the defendants collectively fail to acknowledge or review their errors and instead simply ratify their continued wrongful conduct as in this matter." (Id.). According to Plaintiffs, they "reasonably replied upon the material acts and actions of defendants as exemplified by their retaining counsel to defend the underlying litigation." (Id.). Further, Plaintiffs allege that "[b]ut for" Defendants':

> acts and omissions and disregard for its own records reflecting default by plaintiffs when plaintiffs' regular payments were cashed by Ocwen for nearly a year after a date of default alleged in the underlying litigation resulting in conflicting and otherwise incorrect accounting of plaintiffs' loan, plaintiffs would not have sustained any damages and losses.

(Doc. 14, p. 8).

However, following the Third Circuit's persuasive decision in Schwartz, it is determined that Plaintiffs' UTPCPL claim against U.S. Bank and Ocwen will be dismissed on the ground that it depends on communications protected by Pennsylvania's judicial privilege. As was the case in Schwartz, the communications at issue in Plaintiffs' UTPCPL claim concern the arguments advanced in favor of obtaining a mortgage foreclosure judgment. See (Id. at pp. 7-8). Therefore, such communications were pertinent and material to the redress or relief sought in that foreclosure action. As a result, following the Third Circuit's well reasoned decision in Schwartz, the Court will dismiss Plaintiffs' UTPCPL claims against U.S. Bank and Ocwen under Pennsylvania's judicial privilege doctrine.

Further, since it is determined that judicial privilege applies to and bars Plaintiffs' UTPCPL claims against U.S. Bank and Ocwen concerning communications made during the course of a judicial proceeding, and there being no indication that Plaintiffs are seeking relief under the UTPCPL for communications made beyond the course of a judicial proceeding, see (Doc. 14, p. 7), leave to amend these claims will not be allowed because such amendment would be futile. As a result, Plaintiffs' UTPCPL claims against U.S. Bank and Ocwen will be dismissed with prejudice.

IV. CONCLUSION

Based on the foregoing, Defendants' respective motions to dismiss Plaintiffs' FDCPA claims concerning Plaintiffs' underlying mortgage foreclosure action will be granted. As a result, Plaintiffs' FDCPA claims concerning their underlying mortgage foreclosure action, see (Doc. 14, pp. 5-6), will be dismissed because they are barred by the FDCPA's statute of limitations. As for Defendants' respective motions to dismiss Plaintiffs' state law claims, those motions will be denied in part and granted in part. In particular, Defendants' respective motions to dismiss Plaintiffs' Dragonetti claims will be denied. However, Defendants' respective motions to dismiss Plaintiffs' UTPCPL claims will be granted and, thus, those claims will be dismissed. Lastly. Plaintiffs' FDCPA and UTPCPL claims will be dismissed with prejudice because granting leave to amend those claims would be futile.

An appropriate Order follows.

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